Supreme Court
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No. _____

IN THE

Supreme Court of the United States

KERBY KEANE KELLER,

Petitioner,

v.

DAVID LARKINS, SUPERINTENDENT, SCI DALLAS; THE DISTRICT ATTORNEY OF THE COUNTY OF LANCASTER; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA [MIKE FISHER],

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Third Circuit's decision that Petitioner's due process claim was procedurally barred under *Duncan v. Henry,* 513 US 364 (1995) conflicts with that decision and establishes a higher standard for procedural exhaustion than set forth by this Court.

2. Whether the Third Circuit's decision affirming the State Court's finding that Petitioner was not denied effective assistance of counsel, involves an unreasonable application of this Court's decision in *Strickland v. Washington,* 466 US 668 (1984).

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Petitioner, Kerby Keane Keller, respectfully requests that this Court issue a writ of certiorari to review the judgement entered in this case by the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals on the merits is reported at 251 F.3d 408 (3d Cir. 2001) and is reproduced in Appendix A at 1a-19a. The opinion on the merits and order of the United States District Court for the Eastern District of Pennsylvania is reported at 84 F. Supp.2d 593 (E.D. Pa. 2000) and is reproduced in Appendix B at 20a-54a. The Report and Recommendation of the United States Magistrate Judge is unreported and is reproduced in Appendix C at 55a-71a. The decision of the Court of Appeals denying the petition for rehearing *en banc* is unreported and is reproduced in Appendix D at 72a.

STATEMENT OF JURISDICTION

The opinion and judgement of the United States Court of Appeals for the Third Circuit were dated and entered on May 15, 2001. A timely petition for rehearing en banc was denied on June 15, 2001. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

I. The due process clause contained in Section 1 of the Fourteenth Amendment to the United States Constitution provides, "nor shall any State deprive any person of life, liberty, or property, without due process of law."

II. The Sixth Amendment to the United States Constitution, applicable to the States through the Fourteenth Amendment, provides as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

Petitioner, Kerby Keller, is a Pennsylvania prisoner serving a life sentence for a first degree murder conviction. This petition involves the denial of his application for a writ of habeas corpus under 28 USC § 2254 as amended by the Anti-terrorism and Effective Death Penalty Act (AEDPA). Mr. Keller claims that his federal constitutional right to due process was violated by the introduction at trial of highly prejudicial "other bad acts" evidence submitted in the guise of "motive," having virtually no probative value. Mr. Keller also claims he was denied his constitutional right to effective assistance of counsel where his trial attorney failed to prepare for, interview or adequately cross examine the Commonwealth's psychiatric expert. As a result of this lapse, the Commonwealth was able to introduce graphic evidence of Keller's physical abuse of others to support its expert's testimony that Keller suffered from "Sadistic Personality Disorder," an experimental diagnostic category that was both unreliable and unaccepted in the psychiatric field.

In 1981, Mr. Keller was a former Pagan still friendly with other members of the Pagan Motorcycle Gang, and Barbara Seegan was a nude dancer at a biker bar. They married and, for a while lived on Mr. Keller's farm in Lancaster County, Pennsylvania, where Mr. Keller took up farming and Mrs. Keller became a mother and home maker. By 1989, however, the marriage was in ruins. The couple separated on June 7, 1989, when Barbara Keller left Kerby Keller and their son, ostensibly to return to her parent's home in Pittsburgh, Pennsylvania. (T 728-741).[1]

The separation proved intolerable for Mr. Keller. Previously a meticulous farmer, he began to neglect the fields and farm. Friends also observed a distinct mood change in Mr. Keller, who grew increasingly distraught as it became apparent that his wife was not living in Pittsburgh. Mr. Keller hired Richard Jeffries, a private investigator, to find her. Jeffries testified that Keller wanted to save the marriage and continued

1. "T" refers to the notes of testimony of Mr. Keller's trial.

to believe he would win back his wife. These hopes were shattered on June 20, 1989, when Barbara Keller telephoned her husband and told him she was living with Gary Reiter, one of the Keller's friends who lived down the lane. During this call, Barbara Keller also asked to see her son and Mr. Keller agreed. After hanging up, Barbara Keller told Gary Reiter that Mr. Keller has been "bawling" on the phone and begging her to come back. (T 504-531, 579-591, 166-168).

Later that day, but before Barbara Keller visited the farm, Mr. Keller visited his friend Marvin Burke. Mr. Keller told Mr. Burke he had just discovered that his wife was having an affair with Gary Reiter and was coming to the house that evening to visit Kerby, Jr. Burke said Keller appeared emotional, and continued to talk of reconciliation. (T 551-554).

That evening, shortly after Barbara Keller arrived to see her son, she and Mr. Keller began to argue. As the situation deteriorated, a friend was to called to bring Kerby Jr. to his grandparents' house. After the child left, Mr. Keller continued to press his wife to return home and she repeatedly refused. Finally, Mr. Keller testified, his wife announced her intention to leave him and resume exotic dancing. She then flung at Mr. Keller a packet of photos taken while she was engaged in nude dancing, which provoked him to outrage. A struggle began. At some point, Barbara Keller locked herself in the bedroom. Furious, Kerby Keller broke the door down, looked out an open window, saw his wife attempting to flee and shot her. (T 775-779). Mr. Keller then phoned Gary Reiter who immediately proceeded to the Keller farm. Within seconds of Reiter's arrival, Keller burst from the house firing a 22-caliber rifle in the direction of Reiter's truck. The truck was struck by bullets from the rifle, but Reiter sped off unharmed. (T 131-132).

Mr. Keller then called George Gibble, a friend. Mr. Gibble testified that Mr. Keller was sobbing as he stated he had "just done a terrible thing," that he had "flipped out and shot his wife and possibly Reiter." Keller told Gibble "he couldn't take it anymore", that for months he had been hounded by the FBI, and to discover, in the midst of all this,

that his wife was living with his friend a half-mile away, was "just too much" and he wanted to kill himself. (T 614-616).

Mr. Keller also called his wife's parents and told them what he had done. At trial, Mrs. Keller's mother, Dorothy Seegan, testified that during the call, Mr. Keller mentioned pressure generated by an "investigation" and said he was going to kill himself. This was the first time in any of her statements that Mrs. Seegan mentioned an investigation. (T 396-397). James Seegan, Barbara Keller's father, had listened to the conversation on another telephone in the Seegan residence. The Commonwealth stipulated that when Mr. Seegan described the conversation to the police later that night, he stated that Mr. Keller said he had killed Barbara because she had been cheating on him. (T 663). Mr. Keller wrote a suicide note that said, "Lots of stress. All the harassment. Unfounded investigation by FBI, Crime Commission, etc. Nobody else had anything to do with this. Signed, Kerby Keller. Give the dog a good home." (T 265-266).

Finally, Mr. Keller spoke to his attorney, Richard Gray, who testified that Mr. Keller was highly emotional, stating he intended to kill himself. Mr. Gray calmed his client down and arranged a surrender. (T 632-635).

THE TRIAL

The Commonwealth proceeded on the theory that Keller killed his wife because he discovered she was secretly giving the FBI information against him and the Pagan Motorcycle Gang. At the time, the Pagans were under investigation by the FBI and local authorities for various alleged criminal activities. According to the Commonwealth, Barbara Keller's death was a calculated "hit."

The only evidence adduced in support of this theory, however, was the statement allegedly made by Keller to Dorothy Seegan regarding an "investigation" and the suicide note making reference to harassment from the FBI. Although Mrs. Keller was indeed a confidential FBI informer, not a scintilla of evidence was presented to establish that Mr. Keller suspected this. In fact, all evidence presented on the issue sug-

gested the contrary. FBI Special Agent Daniel Harelson, a Commonwealth witness, testified that in the five years he had been interviewing Barbara Keller, she never once indicated that she believed her husband might be aware of what she was doing. (T 418-419). Richard Gray, Esquire, Mr. Keller's attorney, testified that when he visited Mr. Keller and told him a reporter had asked whether Keller's wife had been an informer, Mr. Keller was shocked. (T 643-649).

Mr. Keller filed *in limine* objections arguing that the Commonwealth's presentation of this unsubstantiated motive would unfairly tar Mr. Keller with the stigma of the Pagans and their criminal activity. The motion was rejected. Because the Pagans were a widely notorious criminal motorcycle gang based in Lancaster County, Pennsylvania, where this case was being tried, the trial court prohibited the Commonwealth from identifying the club by name. However, by the third day of trial, the club's identity was so blatantly obvious, that defense counsel referred to the Pagans by name. The prosecutor then proceeded to saturate the case with references and innuendo concerning the "Pagans" and Mr. Keller's alleged "criminal association" with the "outlaw motorcycle gang" as well as his wife's role as a confidential informant against him and the Pagans.

In opening argument, long before Mr. Keller's trial counsel mentioned the word "Pagan," the prosecutor told the jury that Mr. Keller was involved in "organized criminal activity of a wide ranging scope" and had murdered his wife because he learned she was giving information to the FBI regarding "the criminal activities of her husband and of the organized crime group with which he was associated." (T 43).

The Commonwealth presented evidence through Gary Rieter and FBI agent Daniel Harelson that Barbara Keller had been acting as a confidential informant regarding criminal activities of her husband and an "outlaw motorcycle gang." (T 137-140, 404-413). Mr. Harelson testified that Barbara Keller began acting as a confidential informant in September 1984, that he had interviewed her approximately 50 times over the years, and that 40 of those interviews had yielded "valuable

information" about "criminal activity" of Mr. Keller and "associates of Mr. Keller in the motorcycle gang referred to in this case." (T 410). The agent also testified, however, that Barbara Keller never indicated she believed her husband was aware of what she was doing. (T 418-419). Gary Rieter conceded on cross examination that he never told the police or other investigators that Barbara Keller said she was an informer until that day's testimony. Instead, Rieter told Troopers Ronald Stauffer and John Guth that he believed Barbara Keller was killed because she was living with him and Kerby Keller found out about it. (T 172, 201-202).

On cross-examination of Mr. Keller, the prosecutor repeatedly attempted to connect the Pagans' reputation for violence with Mr. Keller's own behavior and explicitly accused Mr. Keller of having a "propensity for violence." (T 786). The Commonwealth also displayed Mr. Keller's Pagan Motorcycle jacket to the jury and asked him a detailed series of questions about the meaning of various insignia on the jacket. The prosecutor repeatedly advised the jury during cross examination of Mr. Keller that the symbol "1%" on the jacket meant that Mr. Keller was a member of an "outlaw motorcycle gang," that the number "13" stood for the "mother club," which is the "ruling body of the Pagans," that the gang was located in Lancaster County, Pennsylvania, where the case was being tried, and that Mr. Keller had been the "leader" of the "mother club." The prosecutor established that the mother club was in charge of distributing cash generated by the Pagans and then asked a long series of questions designed to show that Mr. Keller could not adequately account for substantial funds he apparently possessed, thus raising the inference that he was still engaged in criminal activities with the Pagans. Mr. Keller was also asked whether his wife wore Pagan "colors" and whether she carried cash around in a locked safety deposit box. (T 809-825, 860).

The jury was also presented with Mr. Keller's telephone records so that the prosecutor could point out that Mr. Keller received numerous collect calls from former "Pagans" who

were "incarcerated," some for "murder," in "penal institutions". (T 829-838). All of this evidence was admitted under the guise of "motive."

Moreover, Commonwealth witness John Barton was permitted to testify, over defense objections, that he once asked Barbara Keller to dance with him, and Mr. Keller became angry and beat him up, stating that he [Keller] was a Pagan. The court allowed Barton to describe the brutality of the beating in great detail as follows: "He [Keller] got me down on the floor. He had me busted up pretty good. I had two black eyes, blood all over the place. I still kept trying to get back up. As I got back up, he pried my finger like this. He broke my finger." (T 1052-1053).

Despite the fact that the Commonwealth had failed to present any evidence that Mr. Keller knew or suspected his wife was informing against him, the prosecutor argued in closing that this was precisely the reason why he killed her. (T 1225).

The defense theory of the case centered on Mr. Keller's state of mind prior to and during the shootings. Mr. Keller acknowledged the shootings, but argued that his mental condition had deteriorated to such a degree that he was incapable of forming the kind of criminal intent required to sustain a conviction for murder in the first degree. To this end, trial counsel created a variety of options for the jury, which included a defense of not guilty by reason of insanity, a mental state consistent with voluntary manslaughter, and diminished capacity consistent with third degree murder. Counsel called Abram M. Hostetter, M.D., a psychiatrist, as a witness. Dr. Hostetter testified that after interviewing Mr. Keller on at least two occasions, he was able to render a diagnosis that Mr. Keller suffered a major depressive illness at the time of the shootings. He stated his opinion that Mr. Keller was insane at the time of the shootings. (T 880-894).

To rebut the defense, the Commonwealth offered its expert, Kurtis Jens, M.D., a psychiatrist. Dr. Jens had never interviewed or examined Mr. Keller. He rendered his opinion by responding to a long hypothetical question offered by the

prosecutor, then offered his opinion that Mr. Keller suffered from Sadistic Personality Disorder and was not insane. (T 943-956).

To lay a "foundation" for this diagnosis, the Commonwealth questioned Mr. Keller about an extramarital affair that occurred over two years prior to Barbara Keller's death. Over vigorous objection, Mr. Keller was asked whether he ever had a relationship with one Sherri Aument, whether he had "chained [her] to a bed rail and beat her 'til she plead for her life," whether Keller had threatened Aument, her family and her boyfriend, and whether he had "flipped the bed over, broke the mirror, broke everything in the apartment, punched her in the nose and had blood all over the place." (T 789-791). The Court did not caution the jury regarding Aument's testimony of physical abuse.

Aument was followed by John Barton, whose testimony describing the details of the severe beating he suffered from Keller was likewise offered as "foundation" for the psychiatric diagnosis. The prosecutor adopted the diagnosis of Sadistic Personality Disorder and argued it throughout the balance of trial. In closing to the jury, the prosecutor stated, without objection, as follows:

"What did he [Dr. Jens] find in Mr. Keller? He found violence. And what have you learned of Mr. Keller? Meanness, violence. I suggest to you that there has been a correct diagnosis in this courtroom and that diagnosis is Sadism. He has a personality disorder, he is a sadist." (T 1208-1209).

Mr. Keller was convicted of first degree murder and attempted murder in the first degree. He was sentenced to a term of life imprisonment and a consecutive term of five to ten years in prison. The Superior Court of Pennsylvania affirmed the judgement and the Supreme Court of Pennsylvania denied Keller's petition for allowance of appeal.

THE POST-CONVICTION HEARING

After his conviction, Mr. Keller retained different counsel to represent him in his pursuit of relief under Pennsylvania's

Post Conviction Relief Act (PCRA) 42 Pa. Cons. Stat. Ann. § 9541 et seq (1998). At the evidentiary hearing, counsel presented Susan Feister, M.D., a prominent clinical psychiatrist specializing in personality disorders, who was also a member of the committee that evaluates and revises the Diagnostic and Statistical Manual (DSM). (EH 113-119).[2] The DSM is a widely used diagnostic manual in the psychiatric community.

Dr. Feister testified that at the time of Mr. Keller's trial, Sadistic Personality Disorder was nothing more than a proposed diagnostic category to be found in the Appendix of the DSM III-R under the caption, "Diagnostic Categories Needing Further Study," and was not generally accepted in the psychiatric field. (EH 125). Sadistic Personality Disorder was dropped from the revision of DSM III-R because it did not stand up as a specific diagnostic category. According to Dr. Feister, it was highly unlikely that Sadistic Personality Disorder would ever be included in the DSM because the research was insufficient to support it. (EH 154)

Mr. Keller's trial attorney, Joshua Lock, Esquire, acknowledged that, in this capital case, knowing the predominant issue would be the mental state of the defendant, and knowing the Commonwealth would present expert testimony thereon, he entered trial and examined a crucial expert witness without having any idea what opinion would be rendered. He did not ask the prosecutor what the diagnosis was, he did not make an effort to speak with the Commonwealth's psychiatric expert, he did not speak with his own psychiatric expert about possible diagnoses, he did not have any materials in the courtroom to assist him in his cross examination, he did not ask his own expert to be present during Dr. Jens' testimony and, most importantly, he did not object to the admission of the diagnosis because he did not know that the diagnosis lacked scientific foundation, or that it was not generally accepted by the psychiatric community. (EH 28-44). Thus, factors that seriously undermined the reliability of the diagnosis were never brought to the jury's attention. Indeed, trial coun-

2. "EH" refers to the notes of testimony from the evidentiary hearing on Mr. Keller's PCRA petition.

sel, with commendable candor, stated he had "no good reason" for failing to pursue these issues. (EH 90-91). Keller argued that trial counsel had rendered ineffective assistance requiring a new trial.

The Commonwealth could do little to rehabilitate Mr. Lock, given this testimony. Instead, it argued that Sadistic Personality Disorder was an accepted diagnosis because, although it was located in the DSM III-R Appendix, it was also listed in the main text under a miscellaneous category entitled "Personality Disorders Not Otherwise Specified" (hereinafter, NOS). Thus, argued the Commonwealth, trial counsel could not be held ineffective for failing to object to or cross examine Dr. Jens' on this subject. Dr. Feister, however, countered that the NOS category did not transform a diagnosis proposed for further study into an accepted diagnosis; it was merely a reservoir for personality dysfunctions that did not fit into any recognized classification. (EH 147-150).

After the hearing, the Commonwealth submitted to the PCRA Court, a 1990 article co-authored by Dr. Feister. The article was essentially a review of data present at the time and recommended further study. However, because the authors noted an apparent "internal consistency" and "descriptive validity" of sadistic personality disorder, the Commonwealth argued that the article demonstrated its acceptance in the psychiatric community.

The PCRA court adopted the Commonwealth's position, concluding that the diagnosis was "generally accepted" at the time of trial by virtue of its inclusion in the "catch-all" provision (NOS). The Superior Court of Pennsylvania affirmed, stating that the finding of the PCRA court was supported in the record, and thus could not be disturbed on appeal. The Pennsylvania Supreme Court declined review.

Mr. Keller then filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 with the United States District Court for the Eastern District of Pennsylvania. Keller argued, inter alia, that the admission of highly prejudicial "other acts" testimony as a pretext for proving motive had deprived Mr.

Keller of his due process right to a fair trial. Keller also argued that his trial attorney had been ineffective for failing to prepare for and deal with Dr. Jens' testimony.

The Magistrate Judge recommended that the petition be denied. She concluded that Mr. Keller's due process claim was procedurally barred because he had not given the state courts fair notice of his federal due process claim. She also recommended denial of the ineffective assistance claim because the State Courts' determination that sadistic personality disorder was an accepted diagnostic category was not "unreasonable". (App. C).

The District Court adopted the Magistrate Judges' recommendation but disagreed with several key aspects of her reasoning. Specifically, the District Court found that Mr. Keller had fairly presented his due process claim in the state courts, stating "[I]t is clear that, from counsel's initial Motion *in limine* to the state collateral appeals, Keller's objections were consistently premised on the notion that a fair trial was impossible if such evidence were admitted." (App. B, 28a). The Court denied the claim on the merits, holding that the prejudice did not rise to constitutional dimensions. With regard to the ineffective assistance claim, the District Court found the State Court's determination that Sadistic Personality Disorder was a valid, recognized diagnosis to be an objectively unreasonable resolution of the facts under 28 USC § 2254(d)(2). The Court also agreed that trial counsel's total failure to investigate the Commonwealth's proposed diagnosis or to cross examine Dr. Jens on the topic, constituted ineffective assistance of counsel under the performance prong of *Strickland v. Washington,* 466 U.S. 668 (1984). However, the Court held that Keller had not demonstrated prejudice, because the diagnosis did not relate to the critical issue of criminal intent. Although he denied the writ, the District Court Judge was troubled enough to grant a Certificate of Appealability, and Mr. Keller appealed. (App. B, 49a-54a).

The Third Circuit Court of Appeals affirmed, but, contrary to the District Court, held that Keller's due process claim was procedurally barred under *Duncan v. Henry,* 513 U.S. 364

(1995). The ineffective assistance claim was denied on the merits. Without addressing the performance prong of *Strickland,* supra, the Third Circuit held that Mr. Keller had failed to demonstrate prejudice. The Court side-stepped the question of admissibility of the evidence by holding that it was a question of state law not subject to habeas review unless the evidence violated due process, which, the Court stated, Mr. Keller had not argued. (App. A, 15a). Presuming the evidence admissible, the Third Circuit then found that proper cross examination about the true status of Sadistic Personality Disorder would have impacted the weight of Dr. Jens' testimony, but not necessarily the verdict. Accordingly, the writ was denied for lack of prejudice.

REASONS FOR GRANTING THE PETITION

I. By Holding That Petitioner's Repeated Claims In The State Courts That He Was Denied A Fair Trial Were Insufficient To Raise A Federal Due Process Claim For Purposes Of Federal Habeas Corpus Review, The Court Of Appeals Has Rendered A Decision Contrary To Applicable Decisions In This Court, And Has Established A Higher Standard Of Procedural Exhaustion Than Required By This Court.

Title 28 U.S.C. § 2254(b) provides that before a District Court considers a petition for habeas corpus on the merits, it must determine whether the petitioner exhausted his claim at every available level of the State proceedings. In *Picard v. Connor,* 404 U.S. 270, 275 (1971), this Court stated that exhaustion of state remedies requires that petitioners "fairly present" federal claims to State Courts in order to give the state "the opportunity to pass upon and correct alleged violations of the petitioner's federal rights."

To fairly present a claim to the State Courts, the petitioner must "present a federal claim's factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted." *McCandless v. Vaughn,* 172 F.3d 255, 261 (3d Cir. 1999) citing *Anderson v. Harless,* 459 U.S. 4 (1982). However, as even the Third Circuit has acknowledged, the petitioner need not have "cited book and verse of the federal constitution" in order to meet this requirement. *Picard v. Connor,* supra, 404 U.S. at 277 (1971); *McCandless v. Vaughn,* supra, 172 F. 3d at 261 (1999). There are a number of ways in which this may be accomplished without citing to the federal constitution. Notice of a federal claim may be conveyed through:

> "(a) reliance on pertinent federal cases employing constitutional analysis, (b) reliance on state cases employing constitutional analysis, (c) assertion of the claim in terms so particular as to call to mind a specific right protected by the Constitution and (d) allegation of a pattern of facts that is well within the mainstream of constitutional litigation." *Evans v. Court of Common Pleas, Delaware*

County, Pa., 959 F.2d 1227, 1232 (3d Cir. 1992); *McCandless v. Vaughn*, 172 F.3d 255, 261 (3d. Cir. 1999).

What matters is that the petitioner in some way set forth the "substance" of his federal claim to the State Courts. *Anderson v. Harless*, 459 U.S. 4, 6 (1982).

Currently, the leading case on this issue, and the case upon which the Circuit Court based its decision, is *Duncan v. Henry*, 513 U.S. 364 (1995). There are a number of critical distinctions between that case and this which were completely overlooked by the Third Circuit. The Court has not only misapplied *Duncan*, but has effectively set a higher standard for procedural exhaustion than that established by this Court.

The habeas applicant in *Duncan, supra*, had been convicted in the State Court of child molestation. At trial, he had objected to testimony by the parent of another child who claimed to have been molested by the defendant some twenty (20) years earlier. In the State Courts, the defendant argued that the evidence was "irrelevant and inflammatory" and resulted in a "miscarriage of justice" under the California Constitution and the California Evidence Code. He made no reference to the federal constitution, but relied explicitly on the state constitution. The California Court of Appeals found the error harmless and affirmed the conviction.

The defendant then filed a habeas corpus petition in the federal court alleging the evidentiary error constituted a denial of due process under the United States Constitution. The district court granted the petition and the Ninth Circuit Court of Appeals affirmed. *Henry v. Estelle*, 33 F.3d 1037 (9th Cir. 1993). The Ninth Circuit found that the state definition of miscarriage of justice (an error making it "reasonably probable that a result more favorable to [defendant] would have been reached in the absence of the error") was essentially equivalent to the federal standard for denial of due process (an error having a "substantial and injurious effect or influence on determining the verdict"). Id. 1041

This Court reversed, stating that the standards, though "somewhat similar", were not equivalent and the applicant

had not attempted to alert the State Courts that he was asserting a denial of due process. The Court found this failure "especially pronounced" because the applicant "did specifically raise a due process objection before the State Court based on a different claim..." Id at 366.

> The Third Circuit later synthesized *Duncan* as follows: "We read *Duncan* as reaffirming the teaching of *Harless and Picard* that the absence of explicit reference to federal law does not resolve the issue of whether a federal claim was fairly presented. It also reaffirms, however, that petitioners must have communicated to the State Courts in some way that they were asserting a claim predicated on federal law." *McCandless v. Vaughn,* 172 F.3d 255, 261 (3d Cir. 1999).

Yet, in applying these precepts, the Third Circuit overlooked several key factors that distinguish *Duncan* from *Keller,* and in the process, instituted an unwarranted expansion of the "fair presentation" requirement. Unlike the applicant in *Duncan,* Mr. Keller repeatedly argued that the evidentiary errors complained of deprived him of a fair trial. We respectfully submit that the Third Circuit's characterization of these allegations as mere "passing references" is inaccurate and unfair.

In his direct appeal to the Superior Court of Pennsylvania, Mr. Keller stated: **"the admission of these matters into evidence in a case such as this had the ineluctable effect of prejudicing the jury against him and depriving him of a fair trial."** This claim was contained in the "Summary of Argument" section of the brief which alerts the Court to the nature of the argument. In the Petition for Allowance of Appeal to the Pennsylvania Supreme Court, the "Conclusion" paragraph of the brief stands alone on a single page, asserting that the errors complained of **"totally deprived Mr. Keller of a fair trial."**

Due process has been defined as "that fundamental fairness essential to the very concept of justice." *Donnelly v. De Christoforo,* 416 U.S. 637, 642 (1974). A constitutional violation occurs when errors "so infect the trial with unfairness" as

to undermine confidence in the verdict. Id at 643. Thus, Keller's assertion in the State Courts that he was "totally deprived of a fair trial" is virtually identical to saying the trial was "fundamentally unfair".

In both of his direct appeal briefs, Mr. Keller alleged that the effect of the "other acts" evidence was "to portray Mr. Keller as some sort of assaultive maniac", that it's purpose was "to establish Mr. Keller's 'propensity' to commit criminal acts of violence and thereby strip him of his presumption of innocence", and that "the jury's focus was diverted from consideration of the facts of this case to those of other unrelated incidents." This argument, in conjunction with explicit assertions that Mr. Keller's was "totally deprived of a fair trial", clearly call to mind a federal due process violation. See *Evans v. Court of Common Pleas, Delaware County, Pa., supra,* 959 F.2d 1227, 1232 (1992) (assertion of the claim "in terms so particular as to call to mind a specific right protected by the "constitution" is sufficient to alert state courts of a federal claim.)

Mr. Keller also cited to and relied upon state court cases that analyzed "other crimes" evidence in terms of its impact on the "fundamental fairness" of trial. See *Evans v. Court of Common Pleas, Delaware County, Pa.,* 959 F.2d 1127, 1232 (3d Cir. 1992), (among the ways in which a petitioner can alert State Courts that he is raising a federal claim without explicitly saying so, is "the reliance on State Court cases employing constitutional analysis in like fact situations.")

On page 39 of his Superior Court brief, and on page 28 of his Petition for Allowance of Appeal, Mr. Keller, in discussing the prejudicial impact of purported "motive" evidence of his association with the Pagans and his wife's role as an FBI informer, stated:

> "Further, the prejudicial impact of the evidence was substantial. The nature of the bad act evidence made Mr. Keller appear to be an outlaw... courts of this Commonwealth have excluded motive evidence and characterized it as "pregnant with prejudice." See *Commonwealth v. Spruill,* 480 Pa. 601, 606, 391 A.2d 1048, 1050 (1978);

> Hude, supra, at 444, 390 A.2d at 185. The Pagan Motorcycle Club misconduct evidence neither advanced the jury's inquiry nor established an element of crime and, therefore, **carried with it prejudice equivalent to that noted in Quarles.**" (emphasis added)

The prejudice addressed in *Commonwealth v. Quarles,* 230 Pa Super. 231, 326 A.2d 640 (1974), was, in the words of the Pennsylvania Superior Court in that case, prejudice **"of such a character in nature as to have deprived appellant of a fair and impartial trial..."** Id at 326 A.2d 641 (emphasis added). The Superior Court began its analysis by framing the issue as one involving the "fundamental fairness" of the trial.

> "Thus the issue before this Court on appeal is whether the detective's explanation in response to the judge's question constituted a **fundamental impairment of the defendant's right to a fair trial."**

After reviewing the disputed evidence and number of other factors, the Superior Court rejected the argument, stating:

> "[T]he testimony in and of itself cannot be said to be of such a character in nature as to have **deprived the appellant of a fair and impartial trial...finding no fundamental impairment of the defendant's right to a fair trial,** we will affirm." Id at 641. (emphasis added)

Thus, through *Quarles,* Keller claimed a "fundamental impairment of (his) right to a fair trial." Id. It is hard to imagine how much closer than this one can get to uttering the words "due process," without actually doing so.

The Third Circuit's suggestion that Keller's claim of being denied a "fair trial" was equivalent to the *Duncan* claim of "miscarriage of justice" (App. A, 8a-9a), completely misses a second key distinction between *Duncan* and *Keller.* The *Duncan* applicant's "miscarriage of justice" claim was explicitly grounded on the state constitution and the state's definition of that term, which was different from the federal definition of violation of due process. Mr. Keller did not narrow his due process claim in this fashion.

Finally, the Court in *Duncan* found especially telling the fact that the applicant had specifically raised a federal due process objection in the State Courts regarding a different claim, while failing to do so with regard to the one in issue. Though the Court did not say why this factor was important, the reason is clear; because the appellant had explicitly argued the Fourteenth Amendment in one issue, but not another, the State Courts reasonably assumed that he was not asserting the federal claim with regard to the issue in which it was not mentioned. Mr. Keller did not raise an explicit federal due process claim with regard to one issue but not another. It was not, therefore, "entirely reasonable" to assume that "the highest State Court to entertain Keller's claim on the merits understood it to be based on a state law..." (App. A, 7a). What is more likely is that the State Court chose to ignore the federal aspect of Keller's claim and decide the case purely on state law. However, this does not vitiate the federal claim.

The problem, however, goes beyond the Third Circuit's misapplication of *Duncan*. The panel decision effectively raises the level of required "fair notice" beyond what this Court defined in *Henry* and *Picard,* thereby deciding an important federal question inconsistently with this Court's precedent.

As previously mentioned, Mr. Keller (1) explicitly asserted in his pretrial motion *in limine* that the disputed evidence should be excluded in order to "assure a fair trial", (2) argued in his direct appeal that the evidence had "stripped [Keller] of his presumption of innocence" and had "impacted the verdict" by diverting the jury's attention away from the legitimate evidence, (3) cited to cases that analyzed like fact scenarios in terms of "fundamental fairness", and (4) explicitly stated in prominent sections of the appellate briefs that he had been deprived of a fair trial as a result of the disputed evidence. If this was not sufficient to present the substance of a due process claim, then it is no longer the law that in order to state a federal due process claim, a petitioner must present the State Courts with the substance of the federal claim, but is not required to utter the phrase, "due process of law". *Picard v. Connor,* 404 U.S. 270, 277-278 (1971). *Duncan v. Henry,* 513

U.S. 364 (1995). The practical effect of the Third Circuit's decision is to create a new standard which provides, in essence, that to fairly present the substance of a federal claim to the state, the petitioner must specifically invoke the phrase "due process of law" and cite the federal constitution. This not-so-implicit new standard is, of course, contrary to the one promulgated by this Court in *Picard* and *Duncan*, and ought not to be left standing absent without further scrutiny.

This Court's statement in *Duncan* that "if a habeas petitioner wishes to claim that an evidentiary ruling of a State Court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in State Court", 513 U.S. at 366, did not purport to reverse or supersede any portion of its prior decision in *Picard v. Connor.* Rather, this Court was emphasizing the portion of those cases which held that, even though the petitioner need not utter the words "federal due process," he must in some way let the State Courts know this is what he is claiming. Indeed, this Court in *Duncan* stated that "*Picard* and *Harless* control the outcome of this case" Id. at 366. The Third Circuit itself adopted this interpretation of *Duncan* in *McCandless v. Vaughn,* 172 F.3d 255, 261 (3d Cir. 1999).

It is enough, we submit, for a habeas petitioner to plainly aver in the State Courts that the admission or use of certain evidence deprived him of a fair trial and to rely on cases that speak to that concept, to raise the red flag of due process. As the District Court observed, "it is clear that from trial counsel's initial motion *in limine* to the state collateral appeals, Keller's objections were consistently premised on the notion that a fair trial was impossible if such evidence were admitted." (App. B, 28a). The Third Circuit's decision in *Keller* demands more than this and is in conflict with this Court's decisions in *Picard* and *Duncan,* as well as with the Third Circuit's own precedent. We respectfully submit that this Court's

review is warranted before the decision is left to stand, and thereby raise even higher the already formidable bar to habeas relief.[3]

II. Petitioner Was Denied Effective Assistance Of Counsel Where Trial Counsel Failed To Prepare For And Effectively Cross Examine The Commonwealth's Psychiatrist, Thus Enabling The Commonwealth To Admit Into Evidence A Diagnosis Of "Sadistic Personality Disorder" Which Was Unreliable, Unaccepted In The Psychiatric Field, And Extremely Prejudicial.

Petitioner Keller is aware of this Court's admonishment that "A petition for writ of Certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of properly stated rule of law." Rule 10, Rules of the Supreme Court of the United States (1999). We respectfully submit, however, that the errors affecting Mr. Keller's trial were profound, and the resulting unfairness so obvious, that an exception should be made in this case. Mr. Keller is serving a life sentence for a first degree murder conviction that almost certainly would not have occurred but for counsel's errors and those of the State Courts.

The question here is whether Mr. Keller's constitutional right to effective assistance of counsel as defined in *Strickland v. Washington,* 466 U.S. 668 (1984) was violated, and whether the judgement of the State Courts in refusing to set aside his conviction on that ground was contrary to, or involved an unreasonable application of clearly established federal law as

3. With regard to the merits of petitioner's due process claim, we submit that the Third Circuit's footnote 2 (App. B, 10a) is little more than dicta and does not appear to be based on any serious analysis of the disputed evidence or its impact on the outcome of the case. If this Court grants certiorari to review the procedural default issue and finds that the due process claim was fairly presented to the state courts, then the merits of the claim must be reviewed in earnest. Indeed, the propriety of the disputed evidence is in serious question, even in the Third Circuit's view (App. A, 10a, n.2) and its impact on the verdict could not have been more calamitous. We submit that the unfair prejudice in this case is of constitutional proportion, as will be demonstrated if this Court decides address the issue.

determined by this Court. 28 USC § 2254. As amended by the Anti-terrorism and Effective Death Penalty Act of 1996 (AEDPA), 2254 (d) provides that habeas corpus relief will be granted only if the State Court's adjudication

> "(1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of facts in light of the evidence presented in the State Court proceedings."

It is our position that the refusal of the state and federal courts to find that trial counsel rendered ineffective assistance of counsel in the circumstances of this case involved an unreasonable application of this Court's decision in *Strickland v. Washington,* supra, 466 US 668 (1984).

In *Strickland,* this Court devised a two-step test to evaluate ineffective assistance of counsel. To obtain relief, the petitioner must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome of the case would have been different. A "reasonable probability" is one sufficient to undermine confidence in the outcome of the case. Id at 694. This Court has stated that the level of proof required to establish a "reasonable probability" is a very lenient one, less than a preponderance of the evidence. See *Nix v. Whiteside,* 475 U.S. 157, 175, 106 S.Ct. 988, 998, 98 L.Ed.2d. 123 (1986) (reasonable probability standard is less demanding than preponderance standard.) *Barker v. Barbo,* 77 F.3d 149, 154 (3rd Cir. 1999). *Williams v. Taylor,* 529 U.S. 362 (2000).

We respectfully submit that Mr. Keller has more than met this burden. Sadistic Personality Disorder was not a reliable or generally accepted psychiatric diagnosis at the time of petitioner's trial, and its admission into evidence was both improper and highly prejudicial. Had trial counsel adequately prepared, he would have been in a position to object to the admission of the diagnosis and the foundational testimony,

based on its unreliability. His failure to do so resulted in an astonishing pageant of graphically described acts of brutality by Mr. Keller, culminating in an equally chilling, yet invalid psychiatric diagnosis of "Sadistic Personality Disorder", all of which substantially influenced the verdict in this case.

With respect to the threshold question of admissibility of the diagnosis and supporting evidence, we submit that, contrary to the Circuit Court's suggestion, Mr. Keller thoroughly argued that the evidence was so prejudicial it violated his due process right to a fair trial, thereby raising a federal question.

However, even if the evidence was admissible, which we dispute, a proper cross-examination would have substantially affected the weight and credibility of Dr. Jens' testimony. Mr. Keller is not required to show that a proper cross examination of the expert would have "entirely discredited his testimony." (App. A, 16a). He is only required to show a "reasonable probability" that with Dr. Jens' testimony diminished, the jury might have accepted one of the options offered in Petitioner's mental defense. See *United States v. Velasquez,* 64 F.3d 844 (3rd Cir. 1995).

A. Keller Argued That the Admission of Dr. Jens' Testimony About Sadistic Personality Disorder and the Evidence Offered to Support it Resulted in a Violation of Due Process. The State Evidentiary Question Therefore Presents a Federal Question for This Court's Review.

In his principal brief to the Third Circuit, Mr. Keller claimed that both the diagnosis of Sadistic Personality Disorder and the putative foundational evidence were "extraordinary prejudicial" because they were "inextricably intertwined" with the disputed "motive evidence," the admission of which, Petitioner had strenuously argued, violated due process:

> "Even though this evidence should not have gone towards the question of criminal intent for first degree murder, that is precisely what it did. **The diagnosis of "sadism" and evidence of Mr. Keller's violence toward others, fit hand-in-glove with the Commonwealth's unfounded motive evidence discussed in Argument I of this brief."**

He repeated this theme on page 44 of the principal brief as follows:

> "As set forth in our Summary of this Argument, the [District] Court's observation that the disputed testimony did not relate to the key issue of criminal intent, is belied by the record. The Commonwealth consistently linked Mr. Keller's violent character to its putative motive theory. **The diagnosis of "sadism" and the evidence offered to support it, are of the same ilk as the motive evidence, and were clearly presented in a fashion designed to support a finding of specific intent.** The unfair prejudicial impact of the evidence is palpable on the face of the record."

Finally, on page 45 of the brief, Mr. Keller concluded:

> "Under these circumstances, where the verdict turned exclusively on the question of state of mind, the admission into evidence of an experimental, unvalidated psychiatric diagnosis which, by its very definition, evoked feelings of outrage and disgust towards Mr. Keller, followed by graphic evidence of brutality, seriously and **unfairly undermined the defense and impacted the verdict in this case."**

Mr. Keller's argument, therefore, has always been that the improper admission of this evidence was so intensely inflammatory that it undermined the fundamental fairness of trial. This is the prejudice Keller suffered as a result of his trial attorney's failure to object to the admission of the proposed diagnosis and the flood of abuse evidence offered to support it. The Third Circuit was not justified in refusing to examine the admissibility of the evidence on the ground that Mr. Keller did not argue it violated his right to a fair trial.

B. The Diagnosis of Sadistic Personality Disorder was Inadmissible Because it was Scientifically Unreliable and Not Generally Accepted in the Field of Psychiatry. The State Court's Finding to the Contrary was an Objectively Unreasonable Determination of Fact in Light of the Evidence Presented.

A federal habeas court may grant relief where the State Court's adjudication "resulted in a decision that was based on

an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding." 28 USC § 2254 (d)(2). The District Court found, and we again stress, that the State Court determination that Sadistic Personality Disorder was a valid and accepted diagnosis and therefore admissible, constituted an objectively unreasonable resolution of facts.

The State Courts concluded that the diagnosis was rendered officially accepted by virtue of its inclusion in NOS section of the main text. However, as the District Court observed, the NOS category is not a "catch all" diagnosis, but a coding for personality dysfunctions that do not fit into, and thus cannot be coded (for insurance purposes, etc.) as a formally recognized diagnosis. In other words, if a clinician identifies symptoms that do not fit into an approved diagnosis, they can be coded, for identification purposes, as NOS. This does not, however, constitute a diagnosis. (App. B, 49a-50a).

Sadistic Personality Disorder failed as a diagnostic category because the scientific and clinical research was insufficient to establish its reliability, which is the critical determinant of admissibility under *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 591, n.9. As the Third Circuit noted, the admissibility of expert testimony in the Pennsylvania Courts is still governed by the "general acceptance" test of *Frye v. United States,* 293 F. 1013 (D.C. Cir. 1933), not the broader "reliability" test articulated by this Court in Daubert. Keller has argued that the testimony concerning sadistic personality disorder failed to meet the requirements of either test. If the testimony failed to satisfy *Daubert's* requirements, a *fortiori,* it failed to meet the more stringent prerequisites of *Frye.* An objection based on these grounds may well have succeeded in precluding the evidence from trial. Nevertheless, in an instance of classic bootstrapping, the Third Circuit stated that Mr. Keller was not prejudiced by trial counsel's failure to object to Dr. Jens' testimony because the trial judge would have overruled the objection anyway, as indicated by the trial judge's decision at the PCRA proceeding that Dr. Jens' testimony was properly admitted. (App. A, 16a). This

reasoning misses several important points. First is the reality that a trial judge is far more likely to take corrective measures at the trial stage, when a timely objection can prevent or minimize prejudice, then to find himself faced with the prospect of declaring himself in error and overturning a conviction at a collateral proceeding. Second, the standard of relief on appeal under the PCRA is different from, and substantially higher than on direct appeal. See *Commonwealth v. Grandberry,* 434 Pa.Super 524, 644 A.2d 204, 207 (1994) ("the findings of the post conviction court will not be disturbed unless they have no support in the record.") Third, the District Court has found that the trial judge and the Superior Court made an objectively unreasonable finding of fact when they held that the diagnosis was generally accepted in the psychiatric community. This fundamental error of the State Courts opened the floodgates to all of the abuse evidence and testimony regarding "sadism", with devastating results. Thus, the Third Circuit's assumption that Keller was not prejudiced by counsel's failure to object to Dr. Jens' testimony because such an objection would have been overruled, is erroneous. We submit there was a reasonable probability that the objection would have been sustained at the trial stage, or reversed on direct appeal, had trial counsel done his job.

The District Court stopped short of finding the evidence improperly admitted, noting that during the post conviction hearing, "Dr. Fiester, herself, indicated that [sadistic personality disorder] might properly be part of another diagnosis." (App. B, 52a). That is not, however, what Dr. Fiester indicated. Dr. Fiester emphasized that inclusion of sadistic personality disorder in the NOS category is "a very different thing from stating that he [Keller] has or may have sadistic personality disorder...The difference is not a semantic one, but a substantial one in terms of emphasis and the - also the official acceptability of the diagnosis." (EH 150).

Unable to shake this explanation, the prosecutor next attempted to lure Dr. Fiester into fitting the symptoms associated with sadistic personality disorder into a different, approved diagnosis. Dr. Fiester testified that she could not

render a diagnosis because the criteria suggested by the prosecutor did not fit into any of the approved categories of the DSM III-R. (EH 151- 153). Thus, the District Court is mistaken; Dr. Fiester did not indicate that sadistic personality disorder might properly be part of a different diagnosis. The diagnosis and evidence used to support it were plainly inadmissible.

C. Prejudice: But for Trial Counsel's Errors, There is a Reasonable Probability That the Outcome of the Case Would Have Been Different.

The District Court found "even giving deference to the State Court as required by statute, Lock's performance fell below acceptable standards." (App. B, 49a). Indeed, the Commonwealth has never argued otherwise, and neither the State Courts nor the Third Circuit have addressed the issue. Thus, the inadequacy of trial counsel's performance in this regard does not appear to be in doubt. The question is whether there is a reasonable probability that his performance influenced the verdict in this case. We submit that had counsel performed even a cursory investigation of the Commonwealth's intended diagnosis, he would have been in a position to object to its admission and to the admission of the abuse evidence, based on the unreliability of the diagnostic category and its lack of acceptance in the psychiatric community.

Even if Sadistic Personality Disorder was an admissible diagnosis, a prepared attorney would have seriously undermined the credibility of the diagnosis by demonstrating that it was of dubious reliability and not equivalent in scientific stature to the diagnosis rendered on petitioner's behalf. The Third Circuit conceded as much but concluded that:

> "weakening the effect of Dr. Jens' testimony on this point would have had little logical bearing on the more critical parts of his testimony, namely, his conclusion that Mr. Keller did not suffer from major depressive disorder, did not experience a psychotic episode at the time of the killing and was able to understand right from wrong and to form a specific intent to kill." (App. A, 17a).

In fact, the testimony had a substantial logical bearing on the critical issue of specific intent to kill. The Commonwealth consistently linked Mr. Keller's violent character to its purported motive theory. The diagnosis of "sadism" and the evidence offered to support it were of the same character as the motive evidence and were clearly presented to the jury in an effort to support a finding of specific intent. The Commonwealth's theme was that Mr. Keller was a "Pagan" who chained Sherri Aument to the bed and "beat her till she plead for her life". The prosecutor then linked Sherri Aument with Barbara Keller in the same sentence, flatly accusing Keller of a "propensity for violence" (T 785-786). He then asked the jury in closing argument, "what have you learned of Mr. Keller? Meanness, violence....He has a personality disorder, he is a sadist." (T 1209) It is inconceivable that this kind of evidence was not viewed by the jury as critical to the issue of specific intent. The jury was invited to infer that, as a violent man who took pleasure in inflicting agony on others, Mr. Keller, "the Sadist," must surely have had a intended to murder his wife. The less lurid, but more important aspects of the intent evidence pale in comparison to this.

The Circuit Court also failed to mention the potent emotional bearing of such testimony on the question of intent. The prejudice inherent in the diagnosis and abuse evidence permeating the trial was truly extraordinary. The Commonwealth was permitted to officially brand Mr. Keller a "sadist", to introduce extensive, graphic evidence of violence against Aument and Barton, without the benefit of a specific limiting instruction, in order to lay a "foundation" for the "diagnosis," and to argue to the jury that Mr. Keller had "sadistic personality disorder," meaning that he was a mean, brutal individual who enjoyed hurting people.

Yet, trial counsel's complete failure to investigate the Commonwealth's intended diagnosis rendered him incapable of making any kind of direct attack on the legitimacy of the Commonwealth's theory. Had trial counsel engaged in the kind of cross examination that the Third Circuit suggests a prepared attorney should have, (App. A, 16a) the jury would

have focused on Dr. Jens' "the more critical testimony" concerning Mr. Keller's state of mind, which counsel had skillfully attacked during cross examination.

Thus, contrary to the decisions of the State and Federal Courts, it is evident that Mr. Keller suffered substantial prejudice as a result of his trial attorney's failure to object to the admission of the testimony, or to prepare for and cross examine the Commonwealth's psychiatrist regarding his diagnosis once it was admitted. The State Courts have made an important factual error in finding otherwise, and have rendered an objectively unreasonable application of *Strickland*, sanctioned by the Third Circuit.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

Filed May 15, 2001

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-1130

KERBY KEANE KELLER,

Appellant

v.

DAVID LARKINS, SUPERINTENDENT, SCI DALLAS; THE DISTRICT ATTORNEY OF THE COUNTY OF LANCASTER; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA [MIKE FISHER]

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA
(Dist. Court No. 99-cv-2791)
District Court Judge: Hon. Marvin Katz

Argued August 2, 2000

Before: ALITO, ROTH, and AMBRO, *Circuit Judges.*

(Opinion Filed: May 15, 2001)

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OPINION OF THE COURT

ALITO, *Circuit Judge*:

Kerby Keller, a Pennsylvania prisoner serving a life sentence for the first-degree murder of his wife, appeals the denial of his federal habeas corpus petition. He argues that his federal constitutional right to due process was violated by the introduction at trial of highly prejudicial evidence having little probative value and that he was denied the effective assistance of counsel because his trial attorney did not adequately prepare for or respond to testimony by the prosecution's psychiatric expert, who stated that Keller might have suffered from a condition called "sadistic personality disorder." We hold that Keller did not fairly present his federal due process claim to the Pennsylvania courts and that this claim is now barred by procedural default. We reject Keller's ineffective assistance of counsel claim because he has not shown that the Pennsylvania courts' application of the prejudice prong of the *Strickland v. Washington*, 466 U.S. 668 (1984), standard for judging ineffective assistance of counsel claims was "unreasonable." *See* 28 U.S.C. § 2254 (d)(1). We therefore affirm.

I.

Keller was once a member of a motorcycle gang called the Pagans, and his wife, Barbara, was a nude dancer. When they married in 1981, Keller purportedly renounced his association with the Pagans, Barbara abandoned her career as a dancer, and the couple moved to a farm in Lancaster County, Pennsylvania. In 1989, Barbara announced that

she was leaving Keller and their son and moving in with her parents in Pittsburgh. Keller subsequently learned that Barbara did not go to Pittsburgh, and he enlisted a private investigator to locate her.

On June 20, 1989, Barbara telephoned Keller and revealed that she was living with Gary Reiter, a friend who resided down the lane from the Keller farm. Later that day, when Barbara returned to the farm, Keller shot and killed her. He then telephoned Reiter and asked that he come to the farm. When Reiter arrived, Keller ran out of the house firing a rifle at Reiter's truck. Bullets hit the truck, but Reiter was able to drive away unharmed. Keller returned to the house and telephoned friends and family members to tell them what he had done. He wrote what appeared to be a suicide note, but he did not attempt to kill himself and instead surrendered to the police.

The prosecution argued that Keller had premeditated his wife's murder, and the prosecution attempted to prove that Keller's motive might have been his discovery that Barbara had been providing information about the Pagans to the Federal Bureau of Investigation. The prosecution theorized that Keller lured Barbara to the house and tied her up on the second floor but that she broke free and was running away from the house when Keller shot and killed her. The prosecution introduced evidence of her work for the FBI, as well as evidence that during Keller's telephone conversations following the shooting, he had connected the killing with pressure resulting from the FBI investigation. In addition, Keller' suicide note stated: "Lots of stress. All the harassment. Unfounded investigation by the FBI, Crime Commission, etc." The prosecution's theory that Keller killed his wife because she was informing on the Pagans provided a basis for introducing evidence regarding Keller's association with the gang and its activities.[1]

The defense presented the following, different version of the events. When Barbara arrived at the farm, Keller urged her to return to him. Barbara said that she intended to

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1. As the District Court noted, however, defense counsel also brought out information about the Pagans. *See Keller v. Larkins*, 89 F. Supp. 2d 593, 600-01 (E.D. PA. 2000).

resume exotic dancing and threw at Keller a stack of photos depicting her dancing. The argument became physical, and Barbara locked herself in a bedroom upstairs. Keller broke down the bedroom door and found that Barbara had climbed out the window and was fleeing. Keller grabbed his gun and shot and killed his wife.

At trial, Keller's defense was based on insanity or the inability to form the intent needed for murder. The defense psychiatric expert, Dr. Abram M. Hostetter, diagnosed Keller as suffering from a major depressive disorder. Dr. Hostetter testified that in his opinion Keller satisfied all of the nine criteria for such a diagnosis listed in the third revised edition of the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (3d ed. rev. 1987) (*DSM-III-R*), a standard reference work that lists and describes mental disorders. Dr. Hostetter opined that Keller's major depression had reached psychotic proportions at the time of the killing, that Keller "did not fully understand the nature and quality of his acts at that moment," and that he had not planned to kill his wife. App. 405, 407. Other witnesses testified to Keller's increasingly distraught behavior over his wife's infidelity.

To rebut Dr. Hostetter, the Commonwealth called its own psychiatric expert, Dr. Kurtis Jens. Dr. Jens had not examined Keller, but based on information provided to him about Keller and his behavior during the time leading up to the killing, Dr. Jens expressed the opinion that Keller did not suffer from a major depressive order. 3/14/1990 Trial Tr. at 933-41. Dr. Jens stated that the symptoms noted by Dr. Hostetter were often exhibited for a limited period of time by people suffering from "any severe distress," and he stated that Dr. Hostetter had not noted any psychotic symptoms. App. 433, 438. He expressed the opinion that Keller was capable of knowing right from wrong and forming a specific intent to kill. *Id.* at 443-44. In addition, in response to a lengthy hypothetical question posed by the Assistant District Attorney, Dr. Jens opined that Keller might suffer from either of two personality disorders, "antisocial personality disorder" or "sadistic personality disorder." *Id.* at 441. Consistent with this latter possible diagnosis, the Commonwealth put on evidence of prior

sadistic acts by Keller, including testimony that he had tied up and brutally beaten a woman with whom he was having an extramarital affair and testimony that he had severely beaten a man who had asked Barbara to dance in a bar.

In March 1990, Keller was convicted by a jury in the Lancaster County Court of Common Pleas of murder in the first degree and attempted murder in the first degree. He was sentenced to a term of imprisonment for life and a consecutive term of five to ten years in prison. The Superior Court of Pennsylvania affirmed the judgment, and the Supreme Court of Pennsylvania denied Keller's petition for allowance of appeal. Keller then filed a petition under Pennsylvania's Post Conviction Relief Act, 42 Pa. Cons. Stat. Ann. §§ 9541 *et seq.* (West 1998). After an evidentiary hearing, the trial judge denied Keller's petition. The Superior Court affirmed, and the Pennsylvania Supreme Court declined review.

Keller next filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 with the United States District Court for the Eastern District of Pennsylvania. Keller argued, among other things, that the admission of highly prejudicial evidence regarding the Pagans and his wife's work as an informant had deprived him of due process as guaranteed by the federal Constitution and that his counsel was ineffective in dealing with Dr. Jens's testimony.

The Magistrate Judge to whom Keller's petition was referred recommended that it be denied. She concluded that in the state court proceedings Keller had challenged the admission of the evidence concerning the Pagans on state-law grounds only and that his federal constitutional claim regarding that evidence was barred by procedural default. She also held that the state courts' conclusion that Keller's trial counsel was not ineffective under the *Strickland* standard was not vulnerable to attack pursuant to 28 U.S.C. § 2254(d)(1).

The District Court followed the Magistrate Judge's recommendation, although it did not agree with some of her reasoning. *Keller v. Larkins*, 89 F. Supp. 2d 593 (E.D. Pa. 2000). The District Court concluded that Keller had fairly

presented his due process claim in the state court proceeding because he had contended that the admission of the evidence in question had deprived him of a "fair trial." *Id.* at 597-98. The District Court held, however, that the admission of this evidence did not rise to the level of constitutional error. *Id.* at 599-606. With respect to Keller's ineffective assistance claim, the District Court held that trial counsel had not provided adequate representation in connection with Dr. Jens's testimony but that Keller had failed to demonstrate prejudice arising from trial counsel's performance. *Id.* at 606-11. Accordingly, the District Court denied the habeas petition but granted a certificate of appealability. *Id.* at 612.

II.

The first claim on appeal is that the admission of evidence of Keller's association with the Pagans and Barbara's role as an FBI informant deprived Keller of due process under the federal Constitution. Keller contends that the Commonwealth lacked proof of Keller's knowledge that his wife was an informant and that, accordingly, evidence regarding his association with the Pagans was not probative but was highly prejudicial. As is required in order to show that an evidentiary error of this type rose to the level of a due process violation, Keller contends that it was of such magnitude as to undermine the fundamental fairness of the entire trial. *McCandless v. Vaughn*, 172 F.3d 255, 262 (3d Cir. 1999); *Lesko v. Owens*, 881 F.2d 44, 51-52 (3d Cir. 1989). In response to Keller's argument, the Commonwealth contends, first, that the Magistrate Judge was correct in holding that Keller's due process claim is barred by procedural default and, second, that the District Court was correct in rejecting the claim on the merits.

We agree with the Commonwealth that Keller's federal due process claim is barred by procedural default. In the absence of an explicit waiver by the state, a federal court is permitted under 28 U.S.C. § 2254(b)(1)(A) to grant a state prisoner's petition for a writ of habeas corpus only if the petitioner has exhausted available state-court remedies. A petitioner has not exhausted such remedies if he has the right under state law to raise his claim by any available

procedure. 28 U.S.C. § 2254(c). To satisfy the exhaustion requirement, a federal habeas claim must have been "fairly presented" to the state courts. *Picard v. Connor*, 404 U.S. 270, 275 (1971). This means that a petitioner must "present a federal claim's factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted." *McCandless*, 172 F.3d at 261. "It is not sufficient that all the facts necessary to support the federal claim were before the state courts," *Anderson v. Harless*, 459 U.S. 4, 6 (1982), and "mere similarity of claims is insufficient to exhaust." *Duncan v. Henry*, 513 U.S. 364, 366 (1995).

Here, there is no doubt that Keller challenged the admission of the evidence relating to the Pagans and Barbara's work as an informant in the state court proceedings, but Keller did not give the state courts "fair notice" that he was asserting a federal constitutional claim rather than a claim that the trial court violated state rules of evidence. On direct appeal, Keller's Superior Court brief devoted more than eight pages to this issue. *See* Brief for Appellant at 31-40, *Commonwealth v. Keller*, No. 3992 Phila. 1992 (Pa. Super. Ct. July 28, 1993). Citing numerous state cases based on state law, the brief cogently argued that the admission of the evidence in question violated the governing Pennsylvania standards regarding proof of uncharged bad acts and that the evidence should have been excluded on the ground that its prejudicial impact outweighed its probative value. Neither the federal Constitution nor any judicial decision based on the federal Constitution was mentioned. Keller's petition for allowance of appeal to the Supreme Court of Pennsylvania was similar. *See* Petition for Allowance of Appeal at 21-28, *Commonwealth v. Keller*, No. 369 M.D. Allocatur 1993 (Pa. Nov. 29, 1993). Neither the Superior Court brief nor the petition fairly presented a federal constitutional claim. The Superior Court, the highest state court to entertain Keller's claim on the merits, understood it to be based on state law, and this reading was entirely reasonable.

In arguing that he fairly presented a federal constitutional claim to the Pennsylvania courts, Keller relies entirely on passing references to the concept of a "fair trial"

in his state court papers. His brief in the Superior Court contained one sentence referring to this concept, as did his petition for allowance of appeal. Keller maintains these references were enough to give the state courts notice that he was raising not just ordinary state-law evidentiary issues, but a federal due process claim.

Keller's argument is reminiscent of one rejected by the Supreme Court in *Duncan v. Henry*, *supra*. There, the habeas petitioner, Henry, challenged the admission of evidence in state court on state-law grounds, arguing that the evidence was "irrelevant and inflammatory" and resulted in a "miscarriage of justice." *Id.* at 365. The Ninth Circuit held that Henry's claim was essentially the same as a claim that he had been denied "the fundamental fairness" guaranteed by the federal due process guarantee. *See Henry v. Estelle*, 33 F.3d 1037, 1041 (9th Cir. 1994). The Supreme Court, however, held that Henry's argument in state court was insufficient to give the state courts fair notice that he was asserting a federal constitutional claim. The Court wrote:

> If state courts are to be given the opportunity to correct alleged violations of prisoners' federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution. If a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state court.

Duncan, 513 U.S. at 366. The Court observed that the state court "understandably confined its analysis to the application of state law." *Id.* Concurring in the judgment, Justice Souter, joined by two other Justices, wrote that Henry's " 'miscarriage of justice' claim in state court was reasonably understood to raise a state-law issue of prejudice, not a federal issue of due process." *Id.* at 366-67 (Souter, J., concurring in the judgment). Thus, the Court held that asserting that an evidentiary error produced a "miscarriage of justice" was not sufficient to put the state courts on notice that Henry was arguing that the error violated federal due process requirements.

In the face of *Duncan v. Henry*, *supra*, we cannot hold that Keller fairly presented a federal due process claim to the state courts. Keller, like Henry, did not invoke the federal due process guarantee in the state courts. Henry claimed that admission of the evidence produced a "miscarriage of justice"; Keller argues that the admission of evidence denied him a "fair trial." Since the Supreme Court found the former language insufficient to give fair notice of a federal due process claim, we are hesitant to attach greater significance to the passing reference to the concept of a "fair trial" on which Keller's argument rests. Here, as in *Duncan v. Henry*, we believe that the Superior Court "understandably confined its analysis to the application of state law," *Duncan*, 513 U.S. at 366, and "reasonably understood" Keller "to raise a state-law issue" only. *Id.* at 367 (Souter, J., concurring in the judgment).

Our decision in *McCandless* supports this conclusion. In that case, the prosecution was permitted to put on evidence that its cooperation agreement with its key witness was conditioned upon corroboration of the witness's assistance. In state court, the habeas petitioner challenged the admission of this evidence on state-law grounds, "contending that the cooperation agreement testimony was 'irrelevant' and 'prejudicial' and therefore improperly admitted." 172 F.3d at 262. We concluded that the petitioner had not fairly presented his federal constitutional claim to the state courts, and we view Keller's state court arguments here as analogous to those that we found inadequate in *McCandless*.

To be sure, we did note at one point in the *McCandless* opinion that the petitioner's state court papers never mentioned "the terms 'constitution', 'due process' *or even 'fair trial.'*" *Id.* (emphasis added). We certainly did not hold, however, that a passing reference to the concept of a "fair trial" would have been enough to alter our decision, and such a conclusion, we think, would have been inconsistent with the plain thrust of *Duncan v. Henry*, *supra*, on which *McCandless* squarely relied. *See id.* We thus hold that Keller's current federal due process claim was not fairly presented to the Pennsylvania courts.

If Keller could still present his federal claim to the state courts at this late date, we would be compelled to dismiss his petition, but it is undisputed that the Pennsylvania courts would not entertain that claim. As the Magistrate Judge noted, Keller is barred from seeking further relief in state court because the statute of limitations for filing another PCRA petition has expired. *See* Pa. Cons. Stat. Ann. § 9545(b)(1) (West 1998). As a result, his federal due process claim is now procedurally defaulted. *See McCandless*, 172 F.3d at 260. Federal courts may not consider procedurally defaulted claims unless "the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claim[ ] will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). To show cause, a petitioner must demonstrate some objective factor external to the defense that prevented compliance with the state's procedural requirements. *Id.* at 753. To show a fundamental miscarriage of justice, a petitioner must demonstrate that he is actually innocent of the crime, *McCleskey v. Zant*, 499 U.S. 467, 494 (1991), by presenting new evidence of innocence. *Schlup v. Delo*, 513 U.S. 298, 316 (1995). Keller does not allege cause or prejudice. Nor does he allege that lack of review by this court will constitute a fundamental miscarriage of justice. Consequently, Keller's federal due process claim is foreclosed from habeas review.[2]

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2. If we were free to reach the merits of this claim, we would hold, for essentially the reasons given by the District Court, that Keller's due process rights were not violated. *See Keller*, 89 F. Supp. 2d at 604-606. Under ordinary principles of evidence law, the propriety of admitting this evidence is questionable because there was no direct evidence and only weak circumstantial evidence that Keller knew that his wife was an informant. There was evidence that Keller knew that the FBI was conducting an investigation, and there was evidence linking the stress resulting from that knowledge with the events on the day of the killing. However, neither Keller's wife, nor Reiter, nor the FBI agent who testified thought that Keller was aware of her work as an informant, and Keller apparently never gave any indication that he possessed such knowledge, even during his telephone conversations just after the shooting when he mentioned the FBI investigation. Nor did he provide any such indication

III.

The second claim on appeal, which Keller properly raised in the state courts, is that he was denied the effective assistance of counsel because his trial attorney did not adequately prepare for and respond to the testimony of the prosecution's psychiatric expert, Dr. Kurtis Jens. As noted, Dr. Jens stated, among other things, that Keller may have had "sadistic personality disorder," and the Commonwealth put on evidence of Keller's prior sadistic acts.

Defense counsel did not attempt to discover the nature of Dr. Jens's testimony before trial and did not seek to bar the admission of Dr. Jens's testimony about "sadistic personality disorder."[3] However, defense counsel did conduct a lengthy and skillful cross-examination regarding the other aspects of Dr. Jens's testimony. App. 444-73. In particular, counsel focused on the fact that Dr. Jens had made his diagnosis without ever speaking with Keller, and defense counsel elicited Dr. Jens's agreement that Keller appeared to possess all of the symptoms of major depression as set forth in the *DSM-III-R*. *Id.* at 445-47, 449-52, 457-58. Dr. Jens stated, however, that in order to make a diagnosis of major depression, a psychiatrist would have to make a professional assessment as to whether the subject possessed each of those symptoms to the requisite degree. *Id.* at 451-52. Defense counsel did not dwell on the subject of "sadistic personality disorder," but he did elicit Dr. Jens's agreement that a patient could have both a major depressive disorder (Dr. Hostetter's diagnosis) and "sadistic personality disorder." *Id.* at 467-68.

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in his supposed suicide note. A federal habeas court, however, cannot decide whether the evidence in question was properly allowed under the state law of evidence. A federal habeas court is limited to deciding whether the admission of the evidence rose to the level of a due process violation, and, like the District Court, we do not believe that it did here.

3. The *DSM-III-R* states that "[t]he essential feature of this disorder is a pervasive pattern of cruel, demeaning, and aggressive behavior directed toward other people, beginning by early adulthood. The sadistic behavior is often evident both in social relationships (particularly with family members) and at work (with subordinates). . . ." *DSM-III-R* at 369.

In his PCRA petition, Keller maintained that his trial counsel was ineffective because he did not challenge the validity of the concept of "sadistic personality disorder," which, he argued, was not scientifically reliable and was not generally accepted in the field of psychiatry. At a hearing before the judge who had tried the case, Keller presented the testimony of an expert, Susan Feister, M.D., a clinical psychiatrist, who pointed out that "sadistic personality disorder" was not included in the main body of the *DSM-III-R*, the most recent version of the *Diagnostic Statistical Manual* at the time of Keller's trial, but instead appeared in an appendix for proposed diagnostic categories needing further study. *See DSM-III-R* at xxv-xxvi, 369-70. Dr. Feister testified that "[sadistic personality disorder] was not an accepted official diagnosis" at that time. She added that "sadistic personality disorder" was not included in the more recent *DSM-IV* and that she thought that it was unlikely ever to be included as an official diagnosis.

The trial judge rejected Keller's ineffective assistance claim. The judge noted that although "sadistic personality disorder" was not included in the main body of the *DSM-III-R*, it was included in the appendix and had thus "been accepted as a classification, albeit one undergoing scrutiny." *Commonwealth v. Keller*, No. 1731-1989, slip op. at 8 (Pa. Ct. Comm. Pl. Oct. 21, 1996), *reprinted in* App. at 63. The judge added:

> We take judicial notice of the fact that defendant's own psychiatric expert, Susan Feister, M.D., who criticized Dr. Jens's use of the [sadistic personality disorder] diagnosis, concluded as follows in a book chapter dated the same year as the trial:
>
> > Thus, data available to date, while not extensive, suggest that sadistic personality disorder, as described in the DSM-III-R describes a personality pattern with remarkably high internal consistency and descriptive validity.

Id. (quoting M. Gay & S. Feister, *Sadistic Personality Disorder, in Psychiatry* (R. Michels ed., 1990)). The judge also observed that "Dr. Feister would have relied on this textbook to make a diagnosis" and that Keller had not been

"prejudiced by use of an improper diagnostic term." *Id.* at 8-9, *reprinted in* App. at 63-64.

On appeal, the Superior Court affirmed the trial judge's holding. The Superior Court wrote that the PCRA court had found that "sadistic personality disorder was generally accepted as a psychiatric diagnosis at the time of trial" and sustained that finding. *Commonwealth v. Keller*, No. 4137 Phila. 1996, slip op. at 10 (Pa. Super. Ct. June 19, 1997), *reprinted in* App. at 84. Thus, both the trial judge and the Superior Court have held that the *Strickland* standard for ineffective assistance of counsel claims has not been met.

Our review of the state courts' decisions is delineated in 28 U.S.C. § 2254(d). As amended by the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d) precludes federal habeas corpus relief unless the state courts' adjudication

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

In *Williams v. Taylor*, 529 U.S. 362 (2000), a majority of the Justices accepted the following interpretation of subsection (1):

> [T]he writ may issue only if one of the following two conditions is satisfied—the state-court adjudication resulted in a decision that (1) "was contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States." Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the

> "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Williams, 529 U.S. at 412-13. A federal habeas court may not grant relief under the "unreasonable application" clause unless a state court's application of clearly established federal law was objectively unreasonable; an incorrect application of federal law alone does not warrant relief. *Id.* at 411.

Our court's prior interpretation of 28 U.S.C. § 2254(d) in *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 891 (3d Cir. 1999)(en banc), is consistent with the Supreme Court's decision in *Williams*. *See Werts v. Vaughn*, 228 F.3d 178, 197 (3d Cir. 2000). As we put it in *Matteo*, the federal habeas court must identify the applicable Supreme Court precedent and then

> must determine whether the state court decision was "contrary to" Supreme Court precedent that governs the petitioner's claim. Relief is appropriate only if the petitioner shows that Supreme Court precedent requires an outcome contrary to that reached by the relevant state court. In the absence of such a showing, the federal habeas court must ask whether the state court decision represents an "unreasonable application of" Supreme Court precedent: that is, whether the state court decision, evaluated objectively and on the merits, resulted in an outcome that cannot reasonably be justified. If so, then the petition should be granted.

Matteo, 171 F.3d at 891 (internal quotations omitted).

Here, the "clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), is the standard for ineffective assistance of counsel enunciated in *Strickland*. *See Williams*, 529 U.S. at 391. Under *Strickland*, a defendant seeking to establish a Sixth Amendment violation must show that counsel's performance fell below an objective standard of reasonableness, as evaluated in light of the facts of the case at the time of counsel's conduct. *Strickland*, 466 U.S. at

688-89. A defendant also must show that counsel's deficient performance actually prejudiced his defense. *Id.* at 687. A defendant is prejudiced if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. The reviewing court must consider the effect of any errors in light of the totality of the evidence. *Id.* at 695-96. A defendant must demonstrate both deficient performance and resulting prejudice in order to state an ineffective assistance claim. *Id.* at 697. Because *Strickland* does not unequivocally mandate a particular outcome in this case, we proceed under the "unreasonable application" prong of 28 U.S.C. § 2254(d)(1).

We need not address the first prong of the *Strickland* test under § 2254(d) because we agree with the District Court that the state courts' rejection of Keller's claim did not involve an unreasonable application of the second prong of that test under § 2254(d)(1).

Keller argues that his trial attorney should have attempted to prevent the admission of Dr. Jens's testimony about "sadistic personality disorder" on the ground that it was scientifically unreliable and not generally accepted in the field of psychiatry. Keller contends that this testimony failed to meet the standard set out in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), for the admission of expert testimony at a federal trial. This case, however, is not a direct appeal from a federal trial in which counsel objected to the admission of expert testimony under Fed. R. Evid. 702. Keller was tried in state court, and the admission of expert testimony in a state trial presents a question of state law[4] — unless, of course, the evidence violates due process or some other federal constitutional right, and Keller makes no such argument. In this case,

4. The Supreme Court of Pennsylvania has not decided whether to adopt the *Daubert* test or retain the "*Frye*" test, *see Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), which it endorsed in *Commonwealth v. Topa*, 369 A.2d 1277 (Pa. 1977). *See Blum v. Merrell Dow Pharmaceuticals, Inc.*, 764 A.2d 1 (Pa. 2000).

both the PCRA judge, who presided over Keller's trial, and the Superior Court held that Dr. Jens's testimony was proper, and we must therefore proceed on the assumption that this testimony would have been admitted at trial even if defense counsel had objected. Consequently, it is apparent that Keller was not prejudiced by trial counsel's failure to object.

Keller also contends that trial counsel was ineffective because he was not prepared to cross-examine Dr. Jens about "sadistic personality disorder" and did not do so adequately. As noted, however, under § 2254(d) we must decide whether a determination of no prejudice involves an unreasonable application of *Strickland*. A full presentation relating to the status of "sadistic personality disorder" at the time of Keller's trial would have brought the following facts to the jury's attention. The "Work Group" appointed to revise the *DSM-III* had recommended that "sadistic personality disorder" and two other categories be included in the main body of the *DSM-III-R*, but these recommendations met with "strenuous objections." *DSM-III-R* at xxv. "The advisory committees that had worked on the definitions of these disorders and the Work Group believed that there was sufficient research and clinical evidence regarding the validity of each of these categories to justify its inclusion in the revised manual," but "critics of each of these categories believed that not only was adequate evidence of the validity of these categories lacking" but that they "had a high potential for misuse." *Id.* at xxv-xxvi. "This controversy was resolved by the inclusion of these three categories in [an appendix] to facilitate further systematic clinical study and research." *Id.* at xxvi. Thus, a full presentation would have informed the jury that mental health researchers and clinicians disagreed about the validity of "sadistic personality disorder" as a diagnostic category. Bringing out this disagreement might have diminished the force of Dr. Jens's testimony regarding "sadistic personality disorder" to some degree, but it would not by any means have entirely discredited it. *See Keller*, 89 F. Supp. 2d at 611 ("full cross-examination on the subject would only have revealed that the diagnosis was of a proposed psychiatric category, not that it was an inadmissible or improper consideration"). Moreover,

weakening the effect of Dr. Jens's testimony on this point would have had little logical bearing on the more critical parts of his testimony, namely, his conclusion that Keller did not suffer from a major depressive disorder, did not experience a psychotic episode at the time of the killing, and was able to understand right and wrong and to form a specific intent to kill. Dr. Jens's testimony on these points, which were central to Keller's defenses of insanity and diminished capacity, were not at all dependent on Dr. Jens's conclusion that Keller may have suffered from "sadistic personality disorder." *See id.* In light of all this, it is not unreasonable to conclude that *Keller* was not prejudiced in the sense relevant here, i.e., that there is not a reasonable probability that the jury, if aware of the disagreement among mental health experts about "sadistic personality disorder," would have found either that Keller was insane or incapable of forming the intent required for first-degree murder. Keller's ineffective assistance of counsel claim must therefore be rejected.

IV.

For the reasons explained above, we affirm.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-1130

KERBY KEANE KELLER,
Appellant

v.

DAVID LARKINS, SUPERINTENDENT, SCI DALLAS;
THE DISTRICT ATTORNEY OF THE
COUNTY OF LANCASTER;
THE ATTORNEY GENERAL OF THE
STATE OF PENNSYLVANIA
[MIKE FISHER]

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA
(Dist. Court No. 99-cv-2791)
District Court Judge: Hon. Marvin Katz

Argued August 2, 2000

Before: ALITO, ROTH, and AMBRO, *Circuit Judges.*

JUDGMENT

This cause came to be heard on the record from the United States District Court for the Eastern District of Pennsylvania on August 2, 2000.

After careful review and consideration of all contentions raised by the appellant, it is hereby ORDERED and ADJUDGED that the judgment of the District Court entered

on February 29, 2000 be and is hereby affirmed, all in accordance with the opinion of this Court.

ATTEST:

/s/ Marcia M. Waldron

Clerk

DATED: May 15, 2001

Certified as a true copy and issued in lieu
of a formal mandate on June 25, 2001

Teste:

/s/ Marcia M. Waldron

Clerk, United States Court of Appeals
for the Third Circuit

APPENDIX B

KELLER v. LARKINS
Cite as 89 F.Supp.2d 593 (E.D.Pa. 2000)

Kerby Keane KELLER, Petitioner,

v.

Superintendent LARKINS, et al., Respondents.

No. CIV. A. 99-2791.

United States District Court,
E.D. Pennsylvania.

Feb. 29, 2000.

Petitioner convicted of first-degree murder and attempted murder sought federal habeas corpus relief. The District Court, Katz, Senior District Judge, held that: (1) due process claims were exhausted for habeas purposes; (2) state courts' evidentiary rulings finding admissible evidence regarding victim's role as FBI informant and related investigations did not warrant habeas relief; (3) state courts' rulings find admissible references to motorcycle gang with which petitioner had been associated and gang's practices did not support habeas relief; (4) defense counsel was required to inform himself of nature of testimony of state's psychiatric expert on petitioner's mental condition; and (5) petitioner was not prejudiced by counsel's failure to investigate nature of state expert's testimony and to cross-examine expert to greater extend regarding conditional diagnosis of sadistic personality disorder.

Petition denied.

1. Habeas Corpus — 383

Although petitioner never cited federal due process as basis for his objections to admission of evidence of his alleged involvement with motorcycle gang and victim's role as informant, it was clear throughout state court proceedings that objections were premised on notion that admission of such evidence prevented fair trial, and therefore due process claims

were fairly presented to state courts and exhausted for federal habeas purposes. U.S.C.A. Const.Amend. 14; 28 U.S.C.A. § 2254(b)(1)(A).

2. Habeas Corpus — 382

To fairly present a claim, as required to exhaust claim for federal habeas purposes, a petitioner must present a federal claim's factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted. 28 U.S.C.A. § 2254(b)(1)(A).

3. Habeas Corpus — 383

Even if petitioner's state law claims did not explicitly rely on a federal right, a claim is exhausted for purposes of federal habeas relief so long as the briefs in question showed reliance on federal or state case law utilizing constitutional analysis or described a claim in terms so particular as to call to mind a specific right protected by the United States Constitution. 28 U.S.C.A. § 2254(b)(1)(A).

4. Habeas Corpus — 452

In deciding claims asserted under provision of federal habeas statute barring relief unless state court's decision was contrary to, or unreasonable application, of Supreme Court precedent, court is required to engage in a two-part analysis: to see if state court ruling was "contrary" to Supreme Court precedent, habeas court should identify applicable Supreme Court precedent and determine whether it resolves petitioner's claim; if outcome was not contrary to applicable body of Supreme Court law, either because state decision complies with Supreme Court rule governing claim, or because no such rule has been established, court should inquire as to whether decision was based on unreasonable application of Supreme Court precedent. 28 U.S.C.A. § 2254(d)(1).

5. Habeas Corpus — 452

On federal habeas review of claim previously adjudicated by state court, appropriate question is whether the state court's application of United States Supreme Court precedent was objectively unreasonable, and, on this point, it is appropriate to consider the rulings of lower federal courts. 28 U.S.C.A. § 2254(d)(1).

6. Habeas Corpus — 767

In addressing factual issues that previously were adjudicated by state court, on federal habeas review district court should look to whether the state court's decision, evaluated objectively, resulted in an outcome that cannot reasonably be justified in light of the evidence presented in the state court proceeding. 28 U.S.C.A. § 2254(d)(2).

7. Criminal Law — 661

The admission of evidence at a state court trial may, in some circumstances, rise to the level of a constitutional violation.

8. Habeas Corpus — 489.1

A federal court considering a petition for habeas relief should not merely review state evidentiary errors, as any such mistakes are not considered to be of constitutional proportion, cognizable in federal habeas corpus proceedings, unless the error deprives a defendant of fundamental fairness in his criminal trial. U.S.C.A. Const.Amend. 14.

9. Constitutional Law — 266(1)
Criminal Law — 338(7)

When it must be said that the probative value of evidence, though relevant, is greatly outweighed by the prejudice to the accused from its admission, then use of such evidence by a state may rise to the posture of fundamental fairness and due process of law. U.S.C.A. Const.Amend. 14.

10. Habeas Corpus — 775(1)

In assessing whether state court's admission of evidence violates due process, federal habeas court must accord the state court deference in its resolution of evidentiary matters. U.S.C.A. Const.Amend. 14.

11. Habeas Corpus — 490(1)

If federal habeas corpus finds that probative value of evidence was so outweighed by prejudice to defendant that admission of such evidence violated due process, court must

consider whether the error was harmless beyond a reasonable doubt. U.S.C.A. Const.Amend. 14.

12. Habeas Corpus — 490(1, 6)

State court's evidentiary rulings that evidence pertaining to role of defendant's wife as FBI informant and investigations concerning defendant and motorcycle gang with which he had been associated was admissible in trial for wife's murder, despite potential for unfair prejudice, were not unreasonable applications of federal law, and thus did not support federal habeas relief on due process grounds; evidence was probative of motive, given circumstantial evidence suggesting that defendant might have killed wife to silence her, and evidence was not excessively prejudicial or inflammatory. U.S.C.A. Const.-Amend. 14; 28 U.S.C.A. § 2254(d).

13. Habeas Corpus — 490(1)

State court's determinations that references to motorcycle gang with which defendant had been associated and gang's practices were admissible in trial for murder of defendant's wife, notwithstanding potential for unfair prejudice, were not objectively unreasonable, either in their factual findings or their application of federal law, and thus did not warrant federal habeas relief; evidence was probative on issue of defendant's credibility and was not so prejudicial as to deprive defendant of fair trial, given that defendant's counsel introduced name of gang, few questions addressed criminal activity beyond those dealing with wife's role as FBI informant, and questions regarding defendant's ownership of gang jacket and continuing friendships with members were not so inflammatory as to prevent fair deliberations. U.S.C.A. Const.Amend. 14; 28 U.S.C.A. § 2254(d).

14. Criminal Law — 338(7)

For purposes of rule excluding relevant evidence having potential for unfair prejudice, evidence is "unfairly prejudicial" if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or otherwise may cause

a jury to base its decision on something other than the established propositions in the case. Fed.Rules Evid.Rule 403, 28 U.S.C.A.

See publication Words and Phrases for other judicial constructions and definitions.

15. Habeas Corpus — 490(6)

State courts' conclusions finding admissible, in trial for murder of defendant's wife, witness' testimony that defendant physically assaulted him after witness asked defendant's wife to dance at a bar and that, during incident, defendant claimed to be member of motorcycle gang were not objectively unreasonable applications of federal law, and thus did not warrant federal habeas relief on due process grounds; statement relating to gang membership went to defendant's credibility, and testimony was not so inflammatory as to taint whole trial, given its relatively minor role and limiting instructions by trial court. U.S.C.A. Const.Amend. 14; 28 U.S.C.A. § 2254(d).

16. Criminal Law — 641.13(1)

To establish ineffective assistance of counsel, defendant must first show that attorney's performance fell below objective standard of reasonableness, and then must demonstrate that there is a reasonable probability that, but for counsel's deficiencies, the outcome of the case would have been different. U.S.C.A. Const.Amend. 6.

17. Criminal Law — 641.13(1)

For purposes of prejudice prong of test for ineffective assistance of counsel, which requires showing of reasonable probability that counsel's deficient performance affected outcome of case, a "reasonable probability" is one sufficient to undermine confidence in the outcome of the proceeding. U.S.C.A. Const.Amend. 6.

See publication Words and Phrases for other judicial constructions and definitions.

18. Criminal Law — 641.13(6)

Sadistic personality disorder was not fully accepted diagnosis at time of murder trial, and therefore defense counsel

could not be excused for failing to cross-examine state expert on subject after expert rendered conditional diagnosis suggesting that defendant may have suffered from such disorder. U.S.C.A. Const.Amend. 6.

19. Criminal Law — 641.13(6)

Defense counsel was required to inform himself of nature of testimony of state's psychiatric expert on murder defendant's mental condition, given that crux of defense was defendant's state of mind; counsel could not be deemed to have made strategic decision in such regard when he offered no justification for failure to interview expert or to exercise ability to discover nature of his testimony. U.S.C.A. Const.Amend. 6.

20. Criminal Law — 641.13(6)

Defendant was not prejudiced by counsel's failure to investigate nature of state expert's testimony pertaining to defendant's mental condition and to cross-examine expert to greater extent regarding his conditional diagnosis of sadistic personality disorder, and thus could not prevail on ineffective assistance of counsel claim; testimony establishing that disorder was only proposed psychiatric category would not have affected jury's rejection of insanity defense, and evidence introduced based on conditional diagnosis did not go to central issue of defendant's criminal intent. U.S.C.A. Const.-Amend. 6.

21. Habeas Corpus — 818

To make substantial showing of the denial of a constitutional right required for certificate of appealability, habeas petitioner must make a credible showing that district court's procedural ruling was wrong and a substantial showing that the underlying habeas petition alleges a deprivation of constitutional rights. 28 U.S.C.A. § 2253(c)(1)(A).

Carmen C. Nasuti, Nasuti and Miller, Philadelphia, PA, for Petitioner.

K. Kenneth Brown, III, Lancaster, PA, for Respondents.

MEMORANDUM & ORDER

KATZ, Senior District Judge.

Before the court is Kerby Keane Keller's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Although the issues raised by Mr. Keller present difficult questions that warrant the granting of a certificate of appealability, the trial errors asserted do not rise to a level that would permit this court to grant relief.

I. Background[1]

On the evening of June 20, 1989, Kerby Keller killed his wife Barbara, from whom he was separated, when she returned to his farmhouse to visit their son. Keller also shot at Gary Reiter, a neighbor who came to the farmhouse after receiving a call from Keller and after hearing gunshots. Keller had learned earlier that day that Reiter had engaged in a romantic relationship with Barbara Keller.

At trial, the state and the defense presented very different theories of the events of June 20. The defense focused on Keller's state of mind and argued that he was incapable of forming the intent necessary for a first-degree murder conviction. The defense attempted to show that the killing and the attempted killing were the product of Keller's extreme emotional state caused by his anguish over his separation from Barbara and her refusal to reconcile, the revelation that Reiter was having an affair with Barbara, and Barbara's statement that she was returning to nude dancing. Keller testified that he could not remember killing Barbara or shooting at Reiter. In support, his trial counsel Joshua Lock offered the testimony of Dr. Abram Hotstetter, a practicing psychiatrist, who rendered a diagnosis of major depressive illness and his opinion that Keller was insane at the time of the shooting.

The state advanced, at least implicitly, alternative theories of the crime. The first relied heavily on the fact that Barbara Keller had been an informant for the FBI for many years and suggested that Keller, who had been a member of the Pagans, a motorcycle gang that had been under investigation, killed his

1. As these events have been described in detail elsewhere, only a brief narration is necessary.

wife either in retaliation or to silence her. This theory also implied that Keller attempted to kill Gary Reiter to silence him in the event that Barbara had revealed incriminating information in the course of their relationship. The government's second theory suggested that Keller had planned to kidnap, possibly torture, and kill both his wife and Reiter in retaliation for her decision to leave him and engage in a relationship with Reiter.

On March 16, 1990, Keller was convicted in the Lancaster County Court of Common Pleas of the first-degree murder of Barbara Keller and of the attempted murder of Gary Reiter. Keller appealed his conviction directly to Pennsylvania's Superior Court and Supreme Court without success; he also filed similarly unsuccessful post-conviction collateral appeals. He is presently serving a life sentence for the murder conviction to be followed by a five-to ten-year term of imprisonment for the attempted murder conviction.

II. The Petition for a Writ of Habeas Corpus

Keller's petition for a writ of habeas corpus raises three arguments. The first asserts that his due process right to a fair trial was violated by the admission of evidence regarding his own association with the Pagan motorcycle gang and his wife's role as an informant for the FBI. He also argues that trial counsel was ineffective for failing to cross-examine the state's expert witness adequately and for failing to object to certain jury instructions.

With respect to the ineffective assistance of counsel claims, the court adopts the magistrate judge's report and recommendation that these claims were properly exhausted. The court also adopts the report and recommendation's conclusion that the ineffective assistance claim pertaining to jury instructions does not articulate a basis for relief. The court writes separately on the due process claim and the first ineffective assistance claim.

A. Exhaustion

[1] Before addressing the merits of either claim, the court must consider whether Keller exhausted his due process claim.[2]

[2, 3] Absent exceptional circumstances, petitioners must exhaust all available state remedies before seeking federal habeas relief. *See* 28 U.S.C. § 2254(b)(1)(A). That is, Keller must have "fairly presented" his claims to the Pennsylvania trial court, the intermediate appellate court, and the supreme court. *See, e.g., Evans v. Court of Common Pleas,* 959 F.2d 1227, 1230 (3d Cir.1992). "To fairly present a claim, a petitioner must present a federal claim's factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted." *McCandless v. Vaughn,* 172 F.3d 255, 261 (3d Cir.1999) (citations, internal punctuation omitted). Even if the state law claims did not explicitly rely on a federal right, a claim is exhausted so long as the briefs in question showed reliance on federal or state case law utilizing constitutional analysis or described a claim in "terms so particular as to call to mind a specific right protected by the Constitution[.]" *Id.* (quoting *Evans,* 959 F.2d at 1232).

Keller never explicitly cited the federal due process clause as the basis for his objections to the admission of evidence pertaining to the Pagans and his wife's role as an informant, but it is clear that, from trial counsel's initial motion *in limine* to the state collateral appeals, Keller's objections were consistently premised on the notion that a fair trial was impossible if such evidence were admitted. Keller's pre-trial motion *in limine* requested the exclusion of evidence making "reference to Mr. Keller's alleged affiliation with the Pagan motorcycle gang" or "reference to an ongoing investigation of the Defendant or of the Pagan motorcycle gang" in order to "assure a fair trial for Mr. Keller." Def.Mot. in Limine at 2 (Feb. 19, 1990). In Keller's post-trial motion, counsel argued that admission of evidence relating to Keller's association with the Pagans and his wife's role as an informant was so prejudicial

2. The magistrate's report and recommendation concluded that Keller had not exhausted this claim and that it was procedurally defaulted.

that it outweighed any "legitimate probative value" that it might have had. Def. Brief on Post-Trial Mot. at 14. Both the appeal to the Pennsylvania Superior Court and the petition for allowance of appeal to the Pennsylvania Supreme Court again focused on the extensive prejudice from the admission of this evidence, and both explicitly argued that Keller was deprived of a fair trial as a result. *See* Brief for Appellant before Super.Ct. at 24 ("The admission of those matters into evidence in a case such as this had the ineluctable effect of prejudicing the jury against him and depriving him of a fair trial."); *id.* at 31-40 (describing ways in which admission of evidence deprived Keller of fair trial because of lack of probativeness and extreme prejudice); Pet. for Allowance of Appeal before Pa.Supreme Ct. at 21-29 (same; referring to inflammatory evidence); *id.* at 39 (concluding brief with statement that introduction of evidence had "totally deprived Mr. Keller of a fair trial").[3]

In short, Keller consistently referred to his right to a fair trial in terms specific enough to consider this claim exhausted. The court will thus consider Keller's due process argument on its merits.

B. Standard of Review

Following the numerous changes made by 1996 legislation, 28 U.S.C. § 2254 states:

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3. On this point, the Supreme Court's opinion in *Duncan v. Henry*, 513 U.S. 364, 115 S.Ct. 887, 130 L.Ed.2d 865 (1995) (per curiam), is distinguishable. In that case, a convicted defendant brought a habeas petition asserting that the admission of certain evidence violated his due process rights. In contrast to the present case, that defendant explicitly relied upon the California constitution and the California evidentiary code in making his claim to the state courts. *See id.* at 364-65, 115 S.Ct. 887. Moreover, he "specifically raise[d] a due process objection before the state court based on a different claim—that the pleading was uncertain as to when the offense occurred." *Id.* at 366, 115 S.Ct. 887. In those circumstances, the Supreme Court held that the state courts had not been fairly notified that the defendant was raising a claim premised on the federal constitution. *See id.* Similarly, *McCandless v. Vaughn*, 172 F.3d 255, 262 (3d Cir.1999), is distinguishable. That petitioner raised challenges to prosecutorial vouching, and, although he couched it as a federal due process claim in his habeas petition, the lower court claims had not been framed as an inquiry into the "fundamental fairness of the entire trial." *Id.* at 262.

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim.

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). Factual determinations made by a state court must be presumed correct unless the petitioner provides clear and convincing evidence to the contrary. *See* 28 U.S.C. § 2254(e)(1).

[4, 5] Claims asserted under 28 U.S.C. § 2254(d)(1) require that the court engage in a two-part analysis. First, to see if a state court ruling was "contrary" to Supreme Court precedent, the habeas court should "identify the applicable Supreme Court precedent and determine whether it resolves the petitioner's claim." *Matteo v. Superintendent, SCI Albion,* 171 F.3d 877, 888 (3d Cir.1999). Phrased differently, "to obtain relief at this stage, a habeas petitioner must show that Supreme Court precedent requires an outcome contrary to that reached by the relevant state court." *Id.* (citations, internal punctuation omitted). If the court determines that the outcome was not contrary to the "applicable body of Supreme Court law—either because the state decision complies with the Supreme Court rule governing the claim, or because no such rule has been established"—the court should inquire as to "whether the decision was based on an unreasonable application of Supreme Court precedent." *Id.* at 889 (citations omitted). Rejecting the stricter approaches of other circuits, the Third Circuit stated that the "appropriate question is whether the state court's application of Supreme Court precedent was objectively unreasonable." *Id.* at 889-90. On this point, it is appropriate to consider the rulings of lower federal courts. *See id.* at 890.

[6] *Matteo* did not address claims brought under 28 U.S.C. § 2254(d)(2). *See Matteo,* 171 F.3d at 888. However, in *Hartey v. Vaughn,* 186 F.3d 367 (3d Cir. 1999), the Third Circuit looked to whether there was evidence in the record that was consistent with the state court's factual findings and whether the state court acted "unreasonably." *See id.* at 372-73. Thus, in addressing factual issues, this court should look to whether the state court's decision, evaluated objectively, resulted in an outcome that cannot reasonably be justified in light of the evidence presented in the state court proceeding.

III. The Due Process Claim

Keller argues that the admission of evidence pertaining to his association with the Pagans and his wife's role as an informant deprived him of a fair trial. Petitioner argues that there was actually no evidence establishing that he was aware of his wife's actions, much less that he killed her because of them. Keller suggests that the state advanced the informant theory as a pretext by which to introduce otherwise inadmissible evidence regarding the Pagans and Keller's past.

A. Disputed Testimony[4]

Although defense counsel moved *in limine* to exclude evidence pertaining to the Pagans, the trial judge considered objections on a case-by-case basis. *See* Order of February 21, 1990. Accordingly, with no objection from the defense, the state's opening statement articulated its theory that Barbara Keller was killed because she was an informant. *See* Trans. at 43.[5] The defendant's opening, in turn, acknowledged that Keller "may even have been a member of an organized motorcycle club," *id.* at 47, but hinted that Keller had come to be aware of the FBI's interest in him because agents came to his

4. Although the petition for habeas corpus does not detail every instance of testimony that it believes was inappropriate, the court understands Keller to object to all government references to the Pagans and Barbara Keller's role as an informant.

5. All references to the "transcript" refer to the trial transcript.

farm, not because he discovered that his wife was an informant. *See id.* at 49. Lock also acknowledged that the defendant had written a suicide note stating that he was under stress because of the "unfounded investigations by the FBI, Crime Commission, et cetera[.]" *Id.* at 68. Lock concluded by telling the jury that they would have to decide whether Barbara Keller had been killed as a result of a domestic disturbance or because she was an informant. *See id.* at 68-69.

The state's case did provide some circumstantial evidence connecting Barbara's death with her role as an informant. First, Gary Reiter testified that Barbara had told him that she was providing information to the FBI about an organized motorcycle gang and that she was fearful of the consequences if her husband discovered this fact. *See* Trans. at 137-40. Although Lock objected to the testimony on hearsay and on relevancy grounds, the court admitted the evidence both as relevant and to show the victim's state of mind. *See id.* at 138-39. Reiter admitted on cross-examination that he had never told the police or other investigators about Barbara's comments to him prior to that day's testimony. *See id.* at 171-72. The state also presented testimony that Keller himself stated on the night of the killing that he was under pressure from investigations. *See, e.g., id.* at 266 (testimony by Officer Guth discussing suicide note previously described in Lock's opening); *id.* at 396-97 (testimony by Dorothy Seegan, victim's mother, stating that Keller told her on the night of the killing that he was under pressure because of the investigations).

In addition, FBI Agent Harelson testified that Barbara Keller contacted him by telephone in 1984 and began providing information regarding an investigation. *See* Trans. at 409. He explained, in response to a question about the "motorcycle gang," that Barbara continued to give him information "regarding criminal activity by Mr. Keller and some of his associates[.]" *Id.* at 410-11. Harelson also explained that Barbara was concerned for her safety and so put many limitations on the information she provided. *See id.* at 411. Harelson told Barbara that these conditions would make it very difficult for him to prosecute anyone, but she persisted, and Harelson testified that he complied with her demands. *See id.* at 411-12. He

also testified that Barbara expressed fear of her husband should he find out and said that he had threatened to kill her if she ever went to the police. *See id.* On cross-examination, Harelson stated that he had no reason to believe that Barbara's husband or his colleagues had ever discovered her collaboration. *See id.* at 418-19.

The next significant event for present purposes is the defense's introduction of the word "Pagan." During the presentation of its case, the defense called Donald Kline and almost immediately asked him if he had been at any time a "member of the Pagan motorcycle club." Trans. at 514. Kline responded that he had been a member approximately fourteen years previously. *See id.* On cross-examination, the state asked Kline whether he had been in the "motorcycle club" with Keller; Kline again answered that he had but emphasized that Keller was no longer a member. *See id.* at 521-22. Following this exchange, the prosecutor asked the court at sidebar whether the "restrictions" on the use of the word "Pagan" were lifted. *Id.* at 522. After Lock stated that he intended to refer to the Pagans again, the court implied that the bar had been lifted. *See id.*

Subsequently, the word "Pagan" was mentioned many times. Many of these comments were fairly casual, as in the testimony of Randall Groff, Joan Elko, and John Anderson.[6] *See* Trans. at 545 (prosecutor asking Groff if his workplace was a "Pagan hangout" and asking if a former bartender, who had since died, was a leading Pagan)[7]; *id.* at 916 (cross examination by state asking if many motorcyclists came to the bar where Elko worked and if she associated with Pagans); *id.* at

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6. Randall Groff was a friend who had picked up the Kellers' son that evening; Joan Elko was one of Barbara's friends who was called to testify about some of Barbara's sexual predilections; and John Anderson was the employer of another witness discussed subsequently.

7. During the state's direct, the prosecutor asked Groff whether he "belong[ed] to the same motorcycle organization that Mr. Keller belongs to[.]" Trans. at 108. The prosecutor also asked, "Are you aware that the police have alleged that he belongs to a—" *Id.* The court sustained an objection at this point, but the state was permitted to inquire further as to Groff's and Keller's involvement in the "motorcycle organization." *See id.* at 109.

1096-98 (cross-examination of Anderson asking whether he was a Pagan and whether he knew of Keller's previous involvement with the organization; defense objection precluded further questioning).[8]

The testimony of three witnesses—the defendant, Sherry Aument, and John Barton—deserves special comment. Probably the most significant discussion of the Pagans occurred during Keller's own testimony. In response to his own counsel's question, Keller stated that he had been a Pagan but that he had withdrawn from the organization several years previously; he explained that he had reaffirmed that separation as part of his marriage vows. *See Trans.* at 717-18. Keller also testified that he became aware of investigations targeting him because of direct contact with the Pennsylvania Crime Commission, local police, and the FBI. *See id.* at 718-20. On cross-examination, the government questioned Keller extensively on the Pagans and clearly attempted to draw a connection between the organization's alleged violence and Keller's own actions. *See, e.g., id.* at 785-86.[9] The state accused Keller of having a "propensity for violence," *id.* at 806, and, soon there-

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8. One additional reference to the Pagans was initiated by the defendant. During the cross-examination of Bonnie Rosengrant, Lock asked if her former boyfriend was a member of the Pagans. *See Trans.* at 993-94. The government's cross-examination briefly inquired as to the same issue. *See id.* at 1000-01.

9. The following exchange occurred:

Q. Mr. Keller, isn't it true that your psychological problem, if you have one, is that you are a very, very violent man. Isn't that correct?
A. I wouldn't say that.
Q. And have you been a very, very violent man all your life.
A. No. I haven't.
Q. All your adult life, isn't that correct?
A. No.
Q. Don't the Pagans have a reputation for being a very violent organization?
A. I don't think so.
Q. You don't think so?
A. No.
Q. Maybe some other people have opinions on the reputation of the Pagans.

Id. at 785-86. Upon Lock's objection, the court struck the last sentence.

after, engaged in a lengthy discussion of the significance of the emblems on his Pagan jacket, suggesting repeatedly that he was a member of an "outlaw motorcycle gang." *Id.* at 808-09.[10] The government questioned Keller at length about the organization of the Pagans, whether he distributed cash for the Pagans, whether he was a leader, and whether Barbara ever carried cash for him. *See id.* at 809-12. The last comment was excluded upon defense counsel's objection. *See id.* at 811-12.

The state was also permitted to inquire about Keller's relationship with various individuals who had been members of the Pagans. For example, the government elicited testimony from Keller that one woman who had called him was the wife and mother of two individuals who had led the Pagans. The government then asked whether the son was in prison for murder, although Lock's objections were sustained as to further questioning. *See* Trans at 828-30. The prosecutor then inquired about Keller's phone records, and, upon defense counsel's objection, stated that he intended to demonstrate that Keller was lying about his retirement from the Pagans based on the number of connections he still had. The judge permitted this testimony for credibility purposes and indicated that he would instruct the jury as to the limited inferences they could draw. *See id.* at 835. The state then established that Keller received calls from several incarcerated Pagans and that he had kept court documents from some of their trials. *See id.* at 835-38. Finally, the state asked Keller whether his wife wore Pagan "colors" and whether he, as a Pagan, considered Barbara to be his property. *See id.* at 860-61.

Keller's attorney also objected vigorously but unsuccessfully to the testimony of Sherry Aument and John Barton. The government argued, and Aument testified, that contrary to Keller's own testimony, Aument had been his girlfriend for some time during his marriage. Although the government strongly suggested at sidebar that Aument would testify extensively about Keller's relationship to the Pagans, her only testimony on the subject came on cross-examination when Lock

10. Keller explained that the emblems meant that his organization was not associated with the American Motorcycle Association. *See id.* at 808-09.

asked if there were many motorcyclists at the bar she frequented. *See* Trans. at 1024-25. Based on the government's representation that Aument would testify in more detail, however, the court gave a limiting instruction prior to her testimony that the jury was not to consider Keller's association with the Pagans when deciding guilt; any such evidence was admitted only "to give you as complete a picture of the testimony that this witness has to say about the time period in question." *Id.* at 1007; *see also id.* at 1002-07 (argument on admissibility).

John Barton's testimony was more extensive. Barton was called by the government to testify that when he had once asked Barbara Keller to dance at a bar, Keller became angry and physically assaulted him. *See* Trans. at 1046-47. The government stated that it wished to offer this testimony because (1) Keller had stated that he was a Pagan while he was abusing Barton, and (2) it supported the government's psychiatric diagnosis of sadistic personality disorder, which is discussed in more detail subsequently. *See id.* at 1048. The government also argued that it should not be prohibited from discussing the Pagans given that the defense first mentioned the word. *See id.* The court permitted the testimony, stating that because Keller had testified that he had terminated his association with the Pagans, the evidence was relevant. *See id.* at 1050. Barton then testified about the altercation: "He got me down on the floor. He had me busted up pretty good. I had two black eyes, blood all over the place. I still kept trying to get back up. As I got back up he pried my finger back like this. He broke my finger." *Id.* at 1052. He also testified that during the incident Keller stated that "I'm a Pagan." *Id.* at 1053.

In addition to these discussions of the Pagans, the trial testimony brought forth several additional references to the investigations against Keller. Besides the testimony described previously, George Gibble, Keller's realtor and friend; Richard Gray, his attorney; and James Seegan, the victim's father, each stated that when Keller called them after the killing, he said that he was under pressure from FBI investigations. *See* Trans. at 617 (Gibble); *id.* at 635 (Gray); *id.* at 659-60 (Seegan). Gray noted, though, that when a reporter called following the case's

inception and asked whether Barbara had been an informer, Keller acted surprised upon hearing of the question. *See id.* at 648-49. Seegan's testimony was inconsistent with earlier statement, and the judge mentioned this fact specifically in the jury instructions. *See id.* at 1047.

The closings of both parties referred to the Pagans and the investigations against Keller. The defense reiterated that the jury could not find Keller guilty based on his past associations and emphasized that he was no longer a Pagan, *see* Trans. at 1114, 1131, although Lock recognized that Keller has continued his association with members of the organization. *See id.* at 1120. Lock also acknowledged that Barbara was providing information to the FBI, *see id.* at 1119, but stressed that there was no evidence indicating that Keller knew. *See id.* at 1128, 1134, 1146, 1169-71. For its part, the prosecution relied heavily on Keller's association with the Pagans, although many such references emerged as a challenge to his credibility. *See id.* at 1199-1200. The state repeatedly suggested that Keller killed his wife because she was an informant. *See id.* at 1200, 1210, 1213, 1224-25. Following the closings, the court instructed the jury that they could not use Keller's prior associations or actions as evidence to find him guilty. *See id.* at 1246.

B. Lower Court Resolution

Keller's post-trial motions asserted that the trial court erred in admitting this evidence of his involvement with the Pagans and of Barbara's role as an informant. *See* Trial Ct.Opin. at 6-7 (Apr. 6, 1992). Rejecting this claim, the trial judge stated that the evidence had been properly admitted because

> the evidence concerning the defendant's prior association with the Pagan motorcycle gang was closely related to the crime for which defendant was being tried. The record indicates that the victim had provided information to the FBI regarding the criminal activity of defendant and the Pagan motorcycle gang for approximately six (6) years. Furthermore, the victim told the FBI that defendant had threatened to kill her if she went to the police with any information regarding his criminal activities with the

> Pagan motorcycle gang. Hence, defendant's affiliation with the Pagan motorcycle gang and the victim's role as a confidential informant are both probative and relevant to the charges brought against defendant.
>
> Moreover, in addition to the testimony of the FBI special agent, defendant himself furnished evidence of his motive to commit the murder. Specifically, defendant prepared a suicide note which related the killing to the FBI investigation of himself.

Id. at 8 (citations omitted). The court also noted that during conversations with various people on the night of the killing, Keller stated that he was under stress from the investigations. *See id.* at 9. Finally, the court stated that Keller's objections to the admission of evidence about the Pagans were baseless, as the defense had itself used the term for the first time. *See id.*

On direct appeal, the Superior Court agreed that the connection between the Pagans, Barbara's role as an informant, and the killing was sufficient to establish relevance:

> The trial court found that there was a substantial nexus between the Commonwealth's proffered motive and the killing (*i.e.,* appellant killed his wife because she had told law enforcement officials about his involvement with the Pagans). Accordingly, wife's role as an informant and appellant's association with the Pagans was relevant to the Commonwealth's theory of motive and specific intent.

Super.Ct.Opin. at 6 (July 28, 1993). As to the claim that the evidence was excessively prejudicial, the court found that the "evidence as to the victim's association with the FBI was probative of appellant's motive and specific intent to kill her." *Id.* at 7. Like the trial court, the Superior Court stressed the suicide note and Barbara's expressed fears as to her safety if Keller discovered her actions. *See id.* The court also ruled that the defense's introduction of the word "Pagan" legitimized its subsequent use, and that, an any event, the evidence regarding the Pagans "did not refer to specific instances of criminal activity." *Id.* The court agreed that the reference to the motorcycle gang was "necessary" to establish motive, *see id.* at 8, and concluded that the "evidence concerning appellant's association with the Pagans was so vague that the jury could not

infer any past criminal conduct on his part. Moreover, the trial judge specifically cautioned the jury as to the limited use of this evidence." *Id.*

The Pennsylvania Supreme Court denied the petition for allowance of an appeal without opinion. *See* Order of Nov. 29, 1993.

C. Discussion

1. Standards

[7-10] The admission of evidence at a state court trial may, in some circumstances, rise to the level of a constitutional violation. *See Lesko v. Owens,* 881 F.2d 44, 51 (3d Cir.1989); *see also Estelle v. McGuire,* 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991) (acknowledging propriety of habeas relief for evidentiary errors of constitutional significance). A federal court considering a petition for habeas relief should not merely review state evidentiary errors, as any such mistakes "are not considered to be of constitutional proportion, cognizable in federal habeas corpus proceedings, unless the error deprives a defendant of fundamental fairness in his criminal trial." *Bisaccia v. Attorney General,* 623 F.2d 307, 312 (3d Cir.1980). "When it must be said that the probative value of such evidence, though relevant, is greatly outweighed by the prejudice to the accused from its admission, then use of such evidence by a state may rise to the posture of fundamental fairness and due process of law." *Lesko,* 881 F.2d at 52 (quoting *Bisaccia,* 623 F.2d at 313); *see also id.* (looking to whether evidence's "probative value is so conspicuously outweighed by its inflammatory content . . . as to violate a defendant's constitutional right to a fair trial"). In making this assessment, the court must accord the state court deference in its resolution of evidentiary matters. *See id.* at 52.

[11] If the court finds that the probative value of the evidence was so outweighed, the court must then consider whether the error was harmless beyond a reasonable doubt. *See Bisaccia,* 623 F.2d at 313; *see also Lesko,* 881 F.2d at 49 n. 7 (acknowledging that if evidence is inflammatory, it is "difficult to envision how such an error could be considered 'harmless' ").

2. Application

[12, 13] This court cannot conclude that the state courts' conclusions were objectively unreasonable, either in their factual findings or in their application of federal law. In conducting this analysis, the court sees two largely separate issues: (1) the state's proof of the connection between Barbara's collaboration and her death, found principally in the testimony of Reiter, Harelson, and those individuals discussing the investigations, and (2) explicit references to the Pagans and their practices.

As to both categories, the court agrees that the evidence at issue was, to varying degrees, probative. With respect to Barbara's role as an informant and the related issues pertaining to the investigations, the trial court relied primarily on state court opinions finding that evidence of motive is always probative, particularly when it tends to show specific intent to kill. *See* Trial Ct.Opin. at 7-8; *see also* Super.Ct.Opin. at 6 (accepting this resolution); *Lesko,* 881 F.2d at 53 (noting that "evidence of motive may be probative of specific intent, particularly for crimes that are allegedly motivated by the desire to interfere with law enforcement"). While the state had no direct evidence that Keller killed his wife to silence her, the combination of Reiter's testimony, Harelson's testimony, and the evidence relating to Keller's own statements that he was under pressure from investigations, certainly produced circumstantial evidence of this theory. The court does not suggest that this evidence was necessarily strong, and a fair reading of the trial transcript certainly indicates that the bulk of the evidence supported a jealousy motive for the killing. However, the evidence of the state's theory was not so weak as to be rendered non-probative.

Although the court will speak to these issues in more detail shortly, the court also finds the evidence regarding the Pagans to be probative, although less so. The trial court found that the evidence pertaining to the Pagans was properly admitted because the defendant himself introduced the term. *See* Trial Ct.Opin. at 9. The court agrees with this conclusion as to the passing references to the Pagans, as in the testimony of Elko, Groff, and Anderson. Also, although not specifically discussed in the trial court's opinion, that court consistently over-

ruled defense objections to detailed inquiries about the Pagans, as in Barton's testimony, on the ground that such questions went to the defendant's credibility. This court cannot say that the evidence was not probative: the defendant had testified that he was no longer a member of the Pagans, and, given the state's theory of the case, evidence pertaining to truthfulness on this subject was significant.

The question then becomes whether evidence of Barbara's collaboration and the related investigations or the evidence regarding the Pagans was so prejudicial as to deprive the defendant of a fair trial. The state courts focused largely on the testimony regarding the collaboration and the investigations, apparently concluding that the probativeness was so strong that there was no chance that the evidence was inflammatory. As to the Pagans, although the trial court did not explicitly address this issue besides stating that the defendant himself had introduced the term, the Superior Court reiterated its belief that the evidence was extremely probative and further concluded that the evidence was not excessively prejudicial given (1) defense counsel's strategic choice to introduce the term "Pagan," (2) the generic discussions of the group's criminal activities, and (3) and the trial court's jury instructions regarding the limited use to which the evidence could be put. *See* Super.Ct.Opin. at 7-8. As to the specific challenge to the cross-examination of Keller and the direct testimony of Barton and Aument, the Superior Court found that this was proper impeachment, *see id.* at 9-10, and that it was not overly prejudicial because of its relationship to the state's psychiatric diagnosis and because of limiting instructions. *See id.* at 11-12.

[14] This court finds that the state courts did not act in the an objectively unreasonable manner in drawing these conclusions. The testimony regarding Barbara Keller's collaboration with the investigations, while, almost by definition prejudicial, was not excessively prejudicial or inflammatory. Evidence is " 'unfairly' prejudicial if it 'appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or otherwise may cause a jury to base its decision on something other than the established propositions in the case.' " *Lesko,* 881 F.2d at 55 (quoting *United States v. Guer-*

rero, 803 F.2d 783, 785 (3d Cir.1986)). While evidence that Keller's wife was providing information on him or his associates to the FBI certainly would not have improved the jury's opinion of him, it was evidence that was closely related to the state's theory of the case, particularly given that the trial court did not permit the state, at least initially, to delve into the bases of the investigation or the alleged criminal acts committed by the Pagans.

The court also agrees with the state court that the passing references to the Pagans were not overly prejudicial given defense counsel's decision to introduce the term and the general description of the group. Most questions asked whether various witnesses associated with Pagans; very few questions, besides those dealing directly with Barbara Keller's work with the FBI, addressed criminal activity.

It is a closer case as to the state's cross-examination of Keller and Barton's testimony. Again, however, the court finds that the state courts did not act unreasonably in ruling as they did. The cross-examination of Keller, particularly regarding his jacket and his friendship with incarcerated individuals, was probably only marginally probative of his credibility. The information elicited, however, was not the type that was so inflammatory as to deprive Keller of a fair trial: the term "Pagans" had already been introduced, and while the simple identification of the organization did not justify unlimited inquiry into its actions, the state's questioning did not bring up any specific criminal actions involving Keller. Nor could the fact that Keller owned a Pagans jacket or that he remained friendly with individuals in jail be construed as being so inflammatory that a reasonable jury would have lost its ability to deliberate fairly.

[15] The testimony of Barton is most troubling. However, Barton's statement recounting Keller's claim that he was a Pagan goes directly to the credibility issues discussed previously. The description of the graphic violence that is perhaps more objectionable was admitted primarily to prove the government's diagnosis of sadistic personality disorder and not to prove that Keller was lying about his disassociation with the Pagans. Even if there were not an alternative justification for

the testimony, however, Barton's testimony was not so inflammatory as to taint the whole trial, given the relatively minor role this testimony played and given that the trial judge issued limiting instructions at least twice stating that the jury could not consider Keller's past associations as evidence of present guilt or as evidence of criminal propensities. *See* Trans. at 1246.

3. Conclusion

To summarize, the court cannot find that the state court's evidentiary rulings that the state could present testimony pertaining to the Pagans, Barbara Keller's collaboration with the FBI, and related investigations were objectively unreasonable under Supreme Court precedent or applicable federal law. Similarly, to the extent that the state courts relied on factual conclusions, this court cannot say that those conclusions were objectively unreasonable. The most troubling aspects of the testimony—the cross-examination of Keller and the testimony of Barton—simply do not rise to the level of constitutional error.

IV. Ineffective Assistance

Keller also argues that his trial counsel's performance in cross-examining the state's expert witness was so deficient that it deprived Keller of his right to counsel. While the court finds that counsel erred, Keller has not met his burden of showing that this behavior affected the outcome of the trial.

A. The Trial Performance

The defendant offered psychiatric testimony from Dr. Hotstetter in support of his claim that he was not guilty by reason of insanity. In response, the government called its own expert, Dr. Kurtis Jens, a psychiatrist. Dr. Jens first testified that Keller was not insane and generally attempted to rebut Dr. Hotstetter's conclusions. Then, in response to an extremely lengthy hypothetical question asking if there were any alternative diagnosis that he would proffer assuming that Keller had engaged in pervasive domestic violence towards at

least two women, that he reacted violently when other men expressed an interest in "his" women, that he limited his wife's ability to socialize, and that he was interested in violence and martial arts, Dr. Jens testified as follows:

> Well, what you have described could describe one of two diagnoses. One would be antisocial personality disorder. To make that diagnosis, I would need to know that some of this occurred before age eighteen because that kind of problem is one that starts earlier and it displays that sort of pattern, The anti-social personality disorder would be more associated with, in addition to what you described, substance abuse and illegal activities.
>
> If what you described were a pervasive pattern that happened over and over again, as you said, if it were not just in the context of the marriage but in other relationships, if it were not just in the context of relationships but included a fascination with all kinds of violence, and if it developed later in life, then we would call it a sadistic personality disorder, which is a common, well-known, pattern of behavior.

Trans. at 943. This statement comprised the disputed diagnosis of sadistic personality disorder.

During cross-examination, Lock established that, as did Dr. Hotstetter, Dr. Jens relied upon the third edition of the Diagnostic and Statistical Manual (the DSM-III) in evaluating Keller. *See* Trans. at 946 *et seq.* He then cross-examined Dr. Jens extensively on his rejection of Dr. Hotstetter's diagnosis. Questioning regarding sadistic personality disorder, however, was limited. Lock asked whether a diagnosis of "an antisocial disorder of one sort or another, a sadistic personality disorder" precluded another diagnosis. Dr. Jens agreed that it did not. *Id.* at 978-79. Lock also suggested that Dr. Jens would need to consider additional evidence to make a true diagnosis, a fact with which Dr. Jens also agreed. *See id.* at 978-80. Lock then questioned Dr. Jens about the Pagans, and Dr. Jens stated that involvement in an organization such as the Pagans could create indications of sadistic personality disorder, *see id.* at 980-81; Dr. Jens also conceded that he had been unaware that Keller was a Marine who served in Vietnam. *See id.* at 981.

Keller's objection to his counsel's performance stems from the importance of this seemingly conditional diagnosis to the course of the trial. In the testimony of at least three witnesses, the government was permitted to inquire over defendant's objection as to specific, graphic incidents of violence in order to establish sadistic personality disorder. *See id.* at 789-91 (Keller's cross-examination in which prosecution asked whether he chained Aument to a bed rail and "beat her 'til she pled for her life' " and whether he ransacked her apartment); *id.* at 826-27 (late objection and government's response)[11]; *id.* at 1010-20 (Aument's graphic testimony that Keller physically abused her on numerous occasions and that he threatened her and her family); *id.* at 1004-05 (Aument testimony over objection); *id.* at 1046-47 (Bartion's testimony that Keller beat him and bent his finger backwards until it broke admitted in part to prove sadistic personality disorder). Also, the state relied on this diagnosis in its closing, stating that rather than insanity, Dr. Jens found "meanness" and "violence," supporting a diagnosis of sadistic personality disorder. *Id.* at 1208-09.

B. Post—Conviction Proceedings

Keller retained new counsel, Robert Beyer, to represent him in post-conviction proceedings. At the evidentiary hearing before the original trial judge, Beyer presented testimony by Susan Fiester, M.D., a clinical psychiatrist specializing in personality disorders and a member of the committee that evaluates and revises the DSM. She noted that at the time of the hearing, the DSM-IV was in use, rather than the DSM-III R[12] that had been authoritative at the time of trial. *See* Evidentiary Hearing (EH) Trans. at 124. She stated that sadistic personality disorder was referenced in the DSM-III only in an "appendix for influence and controversial categories," *id.* at 124, and that items were included in that appendix "to encourage research[.]" *Id.* at 125. The text specifically referred to sadistic personality disorder as a category "needing further study." *Id.*

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11. Although this objection was untimely, the court specifically ruled on the basis relevance. *See id.* at 873.

12. The DSM-III R was a revision of the DSM-III.

She explained the history of sadistic personality disorder as follows:

> There was a basis for the concept of sadism and sadistic behavior in the psychoanalytic literature for many decades. Around the time of the DSM-III R, a clinician, who had had some experience with evaluating persons who had abused their spouses and children, started to do some empirical research to try to understand if there was some type of psychopathology in these individuals that led to there aggressive behavior. And this individual proposed some—a category and criteria that she believed might—would warrant further research and might help in a better understanding of the basis and causes and ways to treat abuse.

Id. at 125-26. She stated that "it was not an accepted official diagnosis" at the time the DSM-III was in use. *Id.* Later, upon questioning from the judge, she stated that it was unlikely that it would ever be included as an official DSM diagnosis because the research to confirm it had not been performed. *See id.* at 154.

Dr. Hotstetter also testified, and he explained that the "diagnosis" of "sadistic personality disorder" was in

> an appendix at the back of the official diagnositc manual that psychiatrists use in classifying mental disorders and it was included with a couple of other possible diagnoses that some people felt may identify a particular group of mental disorders. But it was for further study and for people to look at it as they examined patients to see whether we could agree there was this distinct group of mental disorders.

Id. at 12. Like Dr. Fiester, he also testified that it was not included in the DSM-IV, *see id.* at 13, and that "at the time of trial in this case, . . . sadistic personality disorder was not an accepted disorder among psychiatrists in America[.]" *Id.* at 14.

None of these issues were explored in cross-examination at trial because, as Lock acknowledged, he waived his right to require that the state disclose reciprocal expert witnesses. *See*

EH Trans. at 36; *see also* Pa.R.Crim.P. 305(B), (C). While he assumed that the state would call an expert witness, *see* EH Trans. at 37-38, he never sought to discover the nature of that testimony or of any expert report, and, consequently, had no idea that Dr. Jens would present at least a conditional diagnosis of sadistic personality disorder. *See id.* at 38-39. He did not have the DSM-III with him, and he did not seek to speak with Dr. Jens prior to his testimony or retain his own expert, Dr. Hotstetter, to rebut any portion of Dr. Jens' testimony. *See id.* at 39-41; *see also id.* at 10 (Hotstetter's testimony agreeing with counsel's description of events). Finally, Lock stated that he did not know the status of sadistic personality disorder and its categorization in the DSM-III at the time he cross-examined Dr. Jens. *See id.* at 43-44.[13]

Following the post-conviction hearing, the trial judge ruled against Keller on this issue:

> We reject defendant's assertion that he was prejudiced by use of an improper diagnostic term or that use of this term interferred in any way with the search for the truth. First we note that [Sadistic Personality Disorder] was within the subset of diagnoses covered by 'Personality Disorder Not Otherwise Specified.' Next, we find a definition of [Sadistic Personality Disorder] in Appendix A of the handbook. Consequently, it is disingenuous to suggest that the definition may not be applied to the relevant diagnosis in the subset. By inclusion in the catchall provision, which is not contained in an appendix to the DSM-III R. [Sadistic Personality Disorder] has been accepted as a classification, albeit one undergoing scrutiny. We take judicial notice of the fact that defendant's own psychiatric expert, Susan Feister, M.D., who criticized Dr. Jens's use of the . . . diagnosis, concluded as follows in a book chapter dated the same year as the trial:

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13. While some portions of the DSM-III may have been brought to Lock during the trial, he could not remember what their content was. *See* EH Trans. at 41-43.

> Thus, data available to date, while not extensive, suggest that sadistic personality disorder, as described in the DSM–III R describes a personality pattern with remarkably high internal consistency and descriptive validity.
>
> Gay, M. and Feister, S., *Sadistic Personality Disorder,* in *Psychiatry* (ed. R.Michels, J.B. Lippincott, 1990), 1(21):1–13. Dr. Feister would have relied on this textbook to make a diagnosis, and we find the truth-determining process to have been preserved as regards use of the term [Sadistic Personality Disorder].

Trial Ct.Opin. at 8–9 (Oct. 21, 1996). The court also found that Lock was not ineffective in failing to recall Hotstetter to rebut the diagnosis, as he may have wanted to "let sleeping dogs lie," *id.* at 10, and suggested that "Mr. Lock's awareness of the possibility of alternate diagnoses might well have led him to avoid further rehearsing the Commonwealth's witness or, likewise, tipping his hand through his very questioning of the likely tack of the defense." *Id.* at 11.

The Superior Court adopted these conclusions as well, stating, In rejecting this claim, the PCRA court concluded that the diagnosis was, in fact, generally accepted and valid at the time of trial. The court noted that the diagnosis was included in the DSM–III and stated, "At the time of trial, it was a proposed diagnostic category, which needed further study. However, it also was subsumed in a subset of diagnoses covered by 'Personality Disorder Not Otherwise Specified' " Super.Ct.Opin. at 9 (June 19, 1997). The court reitereated the lower court's statement that Dr. Fiester had agreed with this conclusion in an article. *See id.* at 10.

The Pennsylvania Supreme Court denied the petition for an allowance of appeal without opinion. *See* Order of July 1, 1998.

C. Discussion

[16, 17] The standards for evaluting an ineffective assistance of counsel claim are well-established. Under *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), a petitioner must first show that the attorney's

performance fell below an "objective standard of reasonableness." *Id.* at 688, 104 S.Ct. 2052. The petitioner must then demonstrate that there is a reasonable probability that, but for counsel's deficiencies, the outcome of the case would have been different. *See id.* at 694, 104 S.Ct. 2052. A "reasonable probability is one sufficient to undermine confidence in the outcome of the proceeding." *Id.* The "effect of counsel's inadequate performance must be evaluated in light of the totality of the evidence at trial: 'a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.' " *United States v. Gray,* 878 F.2d 702, 711 (3d Cir. 1989) (quoting *Strickland,* 466 U.S. at 696, 104 S.Ct. 2052).

Following the discussed revisions to 28 U.S.C. § 2254, this court may not simply apply its own interpretation of the reasonableness of counsel's performance. Rather, it must determine whether the state court's resolution of the matter was objectively unreasonable. In addressing this issue, the court notes that the state court essentially ruled that, as sadistic personality disorder was a generally accepted diagnosis, counsel could not be faulted for failing to cross-examine on the subject or otherwise prepare. That is, the courts touched only briefly on the lawyer's actions and focused instead on the merits of the claim.

[18] This court finds, even giving deference to the state court as required by statute, that Lock's performance fell below acceptable standards. Initially, under 28 U.S.C. § 2254(d)(2), the court finds that the state court's resolution of factual matters was objectively unreasonable: the evidence in the record, including Dr. Fiester's testimony, Dr. Hotstetter's testimony, and the article co-authored by Dr. Fiester, does not support the conclusion that sadistic personality disorder was a fully accepted diagnosis such that counsel could be excused for failing to cross-examine on the subject. First, although the trial court suggested that inclusion of the sadistic personality disorder in what it termed a "subset" of diagnoses entitled "Personality Disorder Not Otherwise Specified" indicates that it was a fully accepted diagnosis, Keller points out that this section of the DSM–III actually refers to insurance coding practices,

rather than diagnostic issues. *See* Pet. for Habeas Corpus at 37; *see also* DSM–III § 301.90. Also, the discussion of this disorder in the appendix to the DSM–III clearly states that it was a proposed category. *See* DSM–III app. A at 367. Second, the testimony of Dr. Fiester and Dr. Hotstetter was clear: Sadistic personality disorder was a proposed category and, almost by definition, was not a "true" diagnosis within the DSM–III. Finally, the article on which both the trial court and the Superior Court relied did not purport to offer sadistic personality disorder as an accepted diagnosis. It simply reviewed the literature and research that existed on this proposed category and concluded that the existing evidence was supportive of the classification. *See* Martha Gay & Susan Fiester, *Sadistic Personality Disorder, in Psychiatry* (ed. R.Michels, J.B. Lippincott, 1990), 1(21); *see also* EH Trans. at 120 (Fiester testimony stating that article consisted of a summation). Such a conclusion can have no bearing on the fact that, at the time of trial, sadistic personality disorder was only a proposed category. Dr. Fiester specifically testified that she would not have relied on such an article in making a clinical diagnosis. *See* EH Trans. at 122.

[19] Given this conclusion, the court turns to the attorney's actions. Even if counsel's failure to recall Dr. Hotstetter following Dr. Jens' testimony might be excused as a tactical decision, the failure to inform himself of the very nature of Dr. Jens' testimony was not. While the state court suggested that counsel may have meant to avoid tipping his hand, counsel admitted that he had no idea that Dr. Jens would offer a diagnosis of sadistic personality disorder at all. It is thus difficult to say that he made a strategic decision. "In the context of defense counsel's duty to investigate, 'strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.' " *Gray,* 878 F.2d at 710 (quoting *Strickland,* 466 U.S. at 690–91, 104 S.Ct. 2052). In other words, "Ineffectiveness is generally clear in the context of complete failure to investigate because counsel can

hardly be said to have made a strategic choice against pursuing a certain line of investigation when s/he has not yet obtained the facts on which such a decision could be made." *Id.* at 711.

Obviously, the court is not suggesting that Mr. Lock failed to investigate the case as a whole: even a cursory examination of the trial transcript demonsrates that Lock engaged in extremely thorough investigation of many aspects of the case. However, all parties concede that the crux of the defense was Keller's state of mind, thus the expert testimony on the subject must be considered equally crucial. Given that Mr. Lock "offered no strategic justification for his failure" to interview Dr. Jens or even to exercise his ability to discover the nature of his testimony, *see Gray,* 878 F.2d at 711, it is impossible to state that he made a strategic choice. *Compare United States v. Kauffman,* 109 F.3d 186, 190 (3d Cir.1997) (finding that failure to investigate potential insanity defense resulted in a "cursory, uninformed judgment call"); *Berryman v. Morton,* 100 F.3d 1089, 1100–01 (3d Cir.1996) (upholding district court finding of ineffectiveness when counsel failed, without reasonable grounds for doing so, to investigate potential defense witnesses that substantially undercut government's case), *with Hess v. Mazurkiewicz,* 135 F.3d 905, 908 (3d Cir.1998) (finding counsel not ineffective for failing to investigate and call witnesses when statement would not have been admissible and witnesses would likely have harmed defendant).

[20] Petitioner's claim founders, however, on the second *Strickland* prong. Looking to the likely effect of counsel's investigation and the resulting testimony, the court cannot state that the cross-examination, "if presented to a jury acting 'conscientiously . . . and impartially,' would have led the jury to have a 'reasonable doubt' " respecting Keller's guilt. *Gray,* 878 F.2d at 713 (quoting *Strickland,* 466 U.S. at 695, 104 S.Ct. 2052). For these purposes the court assumes that, had counsel acted effectively, he would have (1) interviewed Dr. Jens and learned that he intended to offer at least a partial diagnosis of sadistic personality disorder, (2) discovered that sadistic personality disorder was only a proposed category, and (3) effectively cross-examined Dr. Jens on the subject.

None of these actions would have affected Dr. Jens' initial rebuttal testimony challenging Dr. Hotstetter's diagnosis on which defendant's own case hinged. Dr. Jens conceded on cross-examination that a diagnosis of sadistic personality disorder was not inconsistent with a finding of insanity, and there is no suggestion that Lock's cross-examination or other preparation on the issue of insanity was inadequate. That is, even with this admission that the diagnoses were not mutually exclusive, the jury clearly rejected the defendant's claim of insanity. Testimony that sadistic personality disorder was proposed category would have had no effect on this issue.

Moreover, petitioner's suggestion that an effective cross-examination might have led to the exclusion of related testimony is unwarranted. The evidence adduced at the post-conviction evidentiary hearing did not suggest that a psychiatrist could not rely at all on the proposed category, and, in fact, Dr. Fiester herself indicated that it might properly be part of another diagnosis. *See* EH Trans. at 150–53. Dr. Jens could also have testified, as Dr. Hotstetter and Dr. Fiester acknowledged, that part of the purpose of including a sadistic personality disorder category in the appendix was to permit professionals to consider whether such problems were present in individuals they examined. In short, full cross-examination on the subject would only have revealed that the diagnosis was of a proposed psychiatric category, not that it was an inadmissable or improper consideration.

Accordingly, while petitioner suggests that had Lock conducted cross-examination thoroughly, the testimony of Keller, Aument, and Barton regarding Keller's violence would have been excluded, the court does not believe that petitioner has met his burden of showing that this would have been the case. Even assuming that petitioner is correct, however, the court cannot find that its exclusion would have affected the outcome of the trial. The real issue in the case was whether the defendant had the criminal intent necessary to be found guilty of first degree murder. None of this testimony went towards that question. While the testimony was not flattering to Keller, the court has already found that Barton's testimony, on its own, did not create prejudice rising to a constitutional error, and

the court reaches a similar conclusion as to the testimony discussing Keller's abuse of Aument. Evidence of Keller's abuse of his wife had already found its way into the trial unchallenged, and the court cannot say that further evidence of abuse was a factor that likely affected the outcome of the trial.

V. Certificate of Appealability

[21] Keller may not appeal this decision unless this court or an appellate court grants a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1)(A). In order for this court to do so, the petitioner must make a "substantial showing of the denial of a constitutional right." *Id.* § (c)(2). This means that the petitioner must make a "credible showing" that this court's procedural ruling was wrong and a "substantial showing that the underlying habeas petition alleges a deprivation of constitional rights." *Morris v. Horn*, 187 F.3d 333, 340 (3d Cir.1999). The court finds that the petitioner has met both of these burdens.

VI. Conclusion

The court concludes that, on the merits, petitioners' claims do not justify a writ of habeas corpus. This conclusion should not, however, overshadow the problematic nature of parts of Keller's trial. Keller's argument, taken at its strongest, suggests that even though the state knew that its proof of a killing motivated by a desire to silence an informer was weak, it chose to proceed on this theory as a means of introducing evidence of the defendant's past associations with a violent and notorious motorcycle gang. Similarly, counsel's failure to prepare a defense to the marginal diagnosis of sadistic personality disorder gave additional, if not dispositive, weight to the state's claims that evidence of graphic violence committed by the defendant was relevant. While the court ultimately concludes that these facts did not so infect the trial as to deprive the defendant of due process or the right to effective assistance of counsel, the defendant's persistent belief that he was treated unfairly is understandable, and, as noted, the court will grant a certificate of appealability on these issues.

ORDER

AND NOW, this 29th day of February, 2000, upon consideration of the Petition for a Writ of Habeas Corpus, and the response thereto, and after review of the Report and Recommendation submitted by the Magistrate Judge, and the objections thereto, it is hereby **ORDERED** as follows:

1. The Report and Recommendation is **APPROVED** and **ADOPTED** with respect to the following conclusions:
   (a) that Petitioner's claims regarding ineffective assistance of counsel were properly exhausted; and
   (b) that Petitioner's claim alleging ineffective assistance of counsel for failure to object to jury instructions does not state a basis for relief.
2. The Petition for a Writ of Habeas Corpus is **DENIED.** Petitioner's due process claim was exhausted, but it does not provide a basis for the issuance of a writ of habeas corpus. Similarly, petitioner's claim of ineffective assistance of counsel related to trial counsel's failure to cross-examine the state's expert witness thoroughly does not provide a basis for the issuance of a writ of habeas corpus.
3. Petitioner has established probable cause and the court grants a certificate of appealability as to the following issues:
   a) Whether the admission of evidence pertaining to the Petitioner's involvement in the Pagans and his wife's role as an informant violated his right to due process; and
   b) Whether trial counsel ws ineffective for failing to cross-examine the state's expert psychatric witness adequately.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KERBY KEANE KELLER	:	CIVIL ACTION
	:	
v.	:	
	:	
SUPT. LARKINS, *et al.*	:	NO. 99-2791

REPORT AND RECOMMENDATION

DIANE M. WELSH
UNITED STATES MAGISTRATE JUDGE
January 13, 2000

Presently before the court is a counseled petition for a writ of habeas corpus filed on behalf of a state prisoner pursuant to 28 U.S.C. § 2254. On March 16, 1990, following a jury trial in the Court of Common Pleas for Lancaster County, the petitioner was convicted of first degree murder and attempted murder. He was subsequently sentenced to a life term of incarceration for the murder conviction to be followed by five to ten year term of incarceration for the attempted murder conviction. The petitioner is serving his life sentence at the State Correctional Institution-Dallas.

In the habeas petition, the following three claims are raised:

> 1. Mr. Keller's due process right to a fair trial was violated by the Commonwealth's presentation of evidence regarding his association with the Pagan motorcycle gang and his wife's role as a confidential FBI informant against him and the Pagan motorcycle gang in order to legitimate the Commonwealth's theory of motive for Mr. Keller's act.
>
> 2. Mr. Keller was denied effective assistance of counsel where trial counsel failed to prepare for, interview and effectively cross-examine the Commonwealth's psychiatrist, thus enabling the Commonwealth to admit into evidence a diagnosis of "Sadistic Person-

ality Disorder", which was unreliable, unaccepted in the psychiatric field, and highly inflammatory.

3. Trial counsel was ineffective for failing to object to the court's charge to the jury as it did not adequately explain the distinction between premeditation and deliberation, both elements of which are required for a conviction of first degree murder.

Brief in Support of Petition for Habeas Corpus ("Petitioner's First Brief") at 22, 31, 47.

In its opinion on direct appeal, the Superior Court of Pennsylvania summarized the trial evidence as follows:

> The Commonwealth proffered two alternative theories of liability against [the petitioner]. First, it claimed that [the petitioner] specifically intended to kill his wife because he learned that she was an FBI informant and intended to relay information to that organization concerning [the petitioner's] association with a local motorcycle gang, known as the "Pagans." At the time, the Pagans were under investigation by the FBI and local authorities. The Commonwealth reasoned that on June 20, 1989, [the petitioner] kidnapped his wife upon luring her into his farmhouse by promising her that she could see their son. Once there, he tied her with string and nylon straps to hooks in the baseboard of the second floor. The Commonwealth presented evidence that Mrs. Keller was able to escape, but that [the petitioner] shot her upon discovering that she was running from the house. He then brought her back to the house and shot her once behind the ear. The Commonwealth also predicated liability for murder in the second degree on the kidnapping.
>
> The evidence established that soon after the killing, [the petitioner] made various telephone calls. His first call was to Gary Reiter, who lived on a parcel of land near the Kellers. After Mrs. Keller left her husband, claiming to have moved to Pittsburgh where her parents resided, she befriended Reiter and moved into his house for a short period of time. The two became romantically involved.

[The petitioner] learned that Mrs. Keller was living with Reiter from an investigator he had hired to locate her.

On the night of the killing, Reiter heard a shot emanating from the Keller property. Soon thereafter, he received the phone call from Keller asking him to come to the farmhouse to discuss his relationship with Keller's wife. Upon Reiter's arrival, Keller began shooting at his truck. Reiter was able to escape.

Afterwards, [the petitioner] called John and Dorothy Seegan, the parents of his wife and told them he had killed Mrs. Keller. When Mrs. Seegan asked why he had shot his wife, he responded that he was under a great deal of pressure with investigations. [The petitioner] also contacted a friend, George Gibble, and told him that he had shot his wife. He claimed he "couldn't take it anymore," and mentioned the FBI and their investigation of him. He also mentioned committing suicide. To that end, [the petitioner] drafted as suicide note which stated: "Lots of stress. All the harassment. Unfounded investigation by FBI, Crime Commission, etc. Nobody else had anything to do with this." The note was signed by [the petitioner]. The police arrested [the petitioner] later that evening.

Although [the petitioner] did not deny shooting his wife, he claimed that he was legally insane at the time of the shooting. He testified that when Mrs. Keller returned that evening she told him she was leaving him for another man and that she was returning to work as a nude dancer. Then, he claimed she threw at him various lewd photographs of herself as a dancer. He stated that he became enraged and remembers nothing until he found himself sitting on the sofa next to the lifeless body of his wife. In this vein, [the petitioner] portrayed himself as a loving husband who could not handle the end of his marriage. [The petitioner] also presented expert testimony that at the time of the killing, he did not fully understand the nature of his actions. [The petitioner] further claimed that although he was once a member of the Pagans, he had disassociated himself from that group in 1981.

> The Commonwealth rebutted [the petitioner's] insanity defense with evidence that he was suffering from Sadistic Personality Disorder. This disorder is characterized by a repeated pattern of cruel behavior towards others for purposes of (1) establishing dominance in a relationship, (2) humiliating or intimidating others, and (3) the sufferer's own pleasure. Lower Court opinion. 4/6/92 at 14-15. In support of this claim, the Commonwealth presented expert testimony on the disorder, as well as the testimony of Sherry Aument who claimed to be romantically involved with the [petitioner]. Ms. Aument stated that [the petitioner] physically abused her on numerous occasions. Her testimony also refuted [the petitioner's] own claim that he had never maintained an intimate relationship with her.

Commonwealth v. Keller, No. 03992 Philadelphia 1992, slip op. at 1-4 (Pa. Super. July 28, 1993).

The petitioner's first claim is that: "Mr. Keller's due process right to a fair trial was violated by the Commonwealth's presentation of evidence regarding his association with the Pagan motorcycle gang and his wife's role as a confidential FBI informant against him and the Pagan motorcycle gang in order to legitimate the Commonwealth's theory of motive for Mr. Keller's act." Petitioner's First Brief at 22. The respondent contends that this claim was not exhausted in the state courts because, when the petitioner presented the question of his association with the Pagan motorcycle gang and his wife's role as a FBI informant, he did not alert the state courts that his claim was based on due process. Response at 13-14. While the petitioner contends that he did exhaust his first claim, *see* Petitioner's Reply at 2-5, he concedes that, if he did not, this claim is procedurally defaulted. *See id.* at 5-6. The petitioner further contends that he can excuse the default by showing that the failure to review his first claim would constitute a fundamental miscarriage of justice. *See id.* at 7-9. The court will address these points.

Before a federal court may consider the merits of a petition for a writ of habeas corpus, the petitioner must have

exhausted all of his available state remedies as to each of his claims relied upon for relief. 28 U.S.C. § 2254(b); *Rose v. Lundy,* 455 U.S. 509 (1982). In order to exhaust state remedies, the petitioner's claims must have been presented to the trial court, the state's intermediate appellate court and the state's highest court. *Evans v. Court of Common Pleas, Delaware County,* 959 F.2d 1227, 1230 (3d Cir. 1992). A claim will not be deemed exhausted if it is raised for the first time in the state's highest court on discretionary review. *Id.* (citing *Castille v. Peoples,* 489 U.S. 346 (1989)).

Exhausting a federal claim involves fairly presenting the claim to all levels of a state's court. *McCandless v. Vaughn,* 172 F.3d 255, 260 (3d Cir. 1999). "To 'fairly present' a claim, a petitioner must present a federal claim's factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted." *Id.* at 261 (citations omitted). "it is not sufficient that a somewhat similar state-law claim was made, . . . yet the petitioner need not have cited 'book and verse' of the federal constitution." *Id.* (citations omitted).

The absence of explicit reference to federal law does not resolve the question of whether a federal claim was fairly presented but the petitioner must have communicated to the state courts in some way that he was asserting a claim predicated on federal law. *Id.* Even if a petitioner's state court briefs failed to explicitly cite federal law, those briefs could nonetheless fairly present his federal claim if they exhibited:

> (a) reliance on pertinent federal cases employing constitutional analysis, (b) reliance on state cases employing constitutional analysis in like fact situations, (c) assertion of the claim in terms so particular as to call to mind a specific right protected by the Constitution, and (d) allegation of a pattern of facts that is well within the mainstream of constitutional litigation.

Id. (quotations omitted).

Review of the petitioner's post verdict motions, Superior Court brief and Supreme Court petition for allowance of

appeal ("allocatur petition") reveal that the petitioner did not explicitly cite the due process clause as the legal basis for his claim involving the prosecution's introduction of evidence concerning his involvement with the Pagan motorcycle gang and his wife's role as an FBI informant. The petitioner implicitly acknowledges this because he cites *McCandless* and argues that the third example given in that opinion applies.[1] He contends that in both the Superior Court and the Supreme Court, he stated the following in the conclusion page of his brief: "The . . . prejudicial stigmatization of Mr. Keller because of his alleged association with the Pagan motorcycle gang, . . . totally deprived Mr. Keller of a fair trial." In his view, this statement fairly presented a due process claim in the state courts.

The court notes that the petitioner does not contend that this same conclusion page was included in the brief he filed in support of his post verdict motions. The court's review of that brief reveals that he did not. In addition, the court has reviewed the Superior Court brief and the allocatur petition. The Superior Court brief does not contain the same conclusion as the allocatur petition and, most importantly, it does not refer to the petitioner being deprived of a fair trial. Thus, even if the court were to conclude that the allocatur petition's conclusion page, which came ten pages after the part of the allocatur petition that addresses the complained of evidence, fairly presented a due process claim to the Supreme Court, the petitioner did not fairly present that claim to the trial court or to the Superior Court. Accordingly, the petitioner did not properly exhaust his state court remedies with respect to his first claim.

As he concedes, the petitioner can no longer go back to the state courts to exhaust this claim because the statute of limitations for filing a PCRA[2] petition has already expired for him. *See* Petitioner's Reply Brief at 6 (citing 42 Pa. C.S.A. § 9545(b)(1)). This means that his claim is procedurally defaulted. *McCandless,* 172 F.3d at 260.

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1 Because the petitioner does not contend that any of the other three *McCandless* examples apply, the court assumes that they do not.

2 The acronym "PCRA" refers to Pennsylvania's Post Conviction Relief Act, 42 Pa. C.S.A. §§ 9541 *et seq.*

A procedurally defaulted claim cannot be reviewed unless "the [petitioner] can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claim will result in a fundamental miscarriage of justice." *Coleman v. Thompson,* 501 U.S. 722, 750 (1991). In order to demonstrate cause, the petitioner must show that "some objective factor external to the defense impeded [the petitioner's] efforts to comply with the state's procedural rule." *Id.* at 753 (citation omitted). Examples of cause include: (1) a showing that the factual or legal basis for a claim was not reasonably available; (2) a showing that some interference by state officials made compliance with the state procedural rule impracticable; (3) attorney error that constitutes ineffective assistance of counsel. *Id.* at 753-54.

The fundamental miscarriage of justice exception is limited to cases of "actual innocence". *Schlup v. Delo,* 513 U.S. 298, 321-22 (1995). In order to demonstrate that he is "actually innocent", the petitioner must present new evidence of his innocence. *Id.* at 316-17. This evidence need not be directly related to the habeas claims the petitioner is presenting because the habeas claims themselves need not demonstrate that he is innocent. *See id.* at 315. The court must consider the evidence of innocence presented along with all the evidence in the record, even that which was excluded or unavailable at trial. *Id.* at 327-28. Once all this evidence is considered, the petitioner's claims can only be reviewed if the court is satisfied "that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Id.* at 327.

The petitioner makes no effort to demonstrate cause and prejudice for his defaulted claim. Instead, he argues that the failure to review his claim would constitute a fundamental miscarriage of justice. Petitioner's Reply at 7-9. However, the petitioner has not submitted any new evidence tending to show he is actually innocent, as is required to satisfy the fundamental miscarriage of justice exception. *See Schlup v. Delo,* 513 U.S. at 316 ("Without any new evidence of innocence, even the existence of a concededly meritorious constitutional

violation is not in itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of a barred claim."). Accordingly, his defaulted claim cannot be reviewed on its merits.

The petitioner's last two claims both involve allegations of ineffective assistance of counsel.[3] Such claims must be evaluated against the two-part test announced in *Strickland v. Washington,* 466 U.S. 668 (1984). First, the petitioner must show that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. In making this determination, the court's scrutiny of counsel's performance must be "highly deferential." *Id.* at 689. The court should make every effort to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* In short, the "court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Id.*

Second, the petitioner must show that counsel's deficient performance "prejudiced the defense", by, "depriv[ing] the [petitioner] of a fair trial, a trial whose result is reliable." *Id.* at 687. That is, the petitioner must show that "there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695. "A reasonable probability is a probability sufficient to undermine confidence in the outcome," *id.* at 694, but it is less than a preponderance of the evidence. *Id.* at 693, 694. If the

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[3] In its initial answer, the respondent conceded that the petitioner's two claims of ineffective assistance of counsel were exhausted. Respondent's Answer at 12-13. In its supplemental answer, the respondent has suggested, without specificity, that some of the factual allegations supporting the petitioner's first ineffective assistance claim may not have been presented in the state courts. Respondent's Supplemental Answer at 10 n.8. Upon review of the petitioner's briefs here and the opinions in the petitioner's state collateral attack, the court is of the view that the petitioner's first claim of ineffective assistance of counsel has been exhausted in the state courts.

petitioner fails to satisfy either part of the *Strickland* test, there is no need to evaluate the other part as his claim will fail. *Id.* at 697.

Prior to the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), federal habeas courts were free to disregard the analysis employed by the state courts when they considered the merits of the petitioner's claims. However, that is no longer the case. The AEDPA now requires federal habeas courts to afford some deference to state court determinations of federal constitutional claims. The deferential standard of review required by the AEDPA is as follows:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim.
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

28 U.S.C. § 2254(d).

In *Matteo v. Superintendent, SCI Albion,* 171 F.3d 877 (3d Cir. 1999) (en banc), the court summarized how federal courts should apply 28 U.S.C. § 2254(d)(1)[4]:

> First, the federal habeas court must determine whether the state court decision was "contrary to" Supreme Court precedent that governs the petitioner's claim. Relief is appropriate only if petitioner shows that "Supreme Court precedent requires an outcome contrary to that reached by the relevant state court." *O'Brien [v. Dubois,* 145 F.3d 16, 24-25 (1st Cir. 1998)]. In the absence of such a showing, the

[4] In *Matteo*, the Third Circuit did not address how 28 U.S.C. § 2254(d)(2) should be applied.

> federal habeas court must ask whether the state court decision represents an "unreasonable application of" Supreme Court precedent: that is, whether the state court decision, evaluated objectively and on the merits, resulted in an outcome that cannot reasonably be justified. If so, then the petition should be granted.

Matteo, 171 F.3d at 891.

The court explained that, when engaging in "contrary to" analysis, the habeas court must first identify the applicable Supreme Court precedent and determine whether it resolves the petitioner's claim. *Id.* at 888. The habeas petitioner need not cite factually identical Supreme Court precedent. *Id.* Rather, the critical inquiry is whether the Supreme Court case-law establishes a rule which " 'can fairly be said to require a particular result in a particular case.' " *Id.* at 889 (quoting *O'Brien v. Dubois,* 145 F.3d at 25). If the habeas court determines that the decision of the state court was not "contrary to" Supreme Court precedent, "either because the state court decision complies with the Supreme Court rule governing the claim, or because no such rule has been established," then the court must engage in "unreasonable application of" analysis. *Id.* at 889.

The court noted that "unreasonable application of" analysis does not permit the habeas court to grant the writ " 'merely because it disagrees with the state court's decision, or because, left to its own devices, it would have reached a different result.' " *Id.* (quoting *O'Brien,* 145 F.3d at 25). The reason for this restriction is that de novo review of federal constitutional claims is barred by 28 U.S.C. § 2254(d)(1). *Id.* at 889. The court held that:

> the appropriate question is whether the state court's application of Supreme Court precedent was objectively unreasonable. The federal habeas court should not grant the petition unless the state court decision, evaluated objectively and on the merits, resulted in an outcome that cannot reasonably be justified under existing Supreme Court precedent.

Id. at 889-90. When engaging in "unreasonable application of" analysis, the habeas court may consider the decisions of the inferior federal courts. *Id.* at 890. The court went on to explain that the "unreasonable application of" standard is necessarily imprecise:

> the "unreasonable application of" standard admits of no a fortiori definition: "None of this answers the question when a departure is so great as to be 'unreasonable,' for that question lacks an abstract answer. . . . . Questions of degree — like questions about the proper use of 'discretion' — lack answers to which the labels 'right' and 'wrong' may be attached."

Id. at 891 (quoting *Lindh v. Murphy,* 96 F.3d 856, 871 (7th Cir. 1996) (en banc), *rev'd on other grounds,* 521 U.S. 320 (1997)).

With this teaching in mind, the court will consider whether the state courts' decisions concerning the two claims of ineffective assistance were either "contrary to" or an "unreasonable application of" federal law as established by the Supreme Court. It is important to note that, if the petitioner fails to show that a state court's adjudication of a claim was "contrary to" or an "unreasonable application of" federal law with respect to either part of the *Strickland* test, his challenge to the state court's adjudication of that claim must fail. *Strickland,* 466 U.S. at 697.

The petitioner's first ineffective assistance of counsel claim is: "Mr. Keller was denied effective assistance of counsel where trial counsel failed to prepare for, interview and effectively cross-examine the Commonwealth's psychiatrist, thus enabling the Commonwealth to admit into evidence a diagnosis of "Sadistic Personality Disorder", which was unreliable, unaccepted in the psychiatric field, and highly inflammatory." Petitioner's First Brief at 31.

When it reviewed the decision of the PCRA court, the Superior Court adjudicated this claim as follows:

> The defense psychiatrist, Dr. Abram M. Hostetter, diagnosed [the petitioner] with a major depressive illness at the time he murdered his wife. Dr. Hostetter also opined that [the petitioner] was insane since he did not

understand the nature and quality of his acts. On the other hand, the Commonwealth witness, Dr. Kurtis Jens, diagnosed [the petitioner] with sadistic personality disorder and said [the petitioner] was able to understand the nature and quality of his acts.

[The petitioner] suggests that the Commonwealth diagnosis, sadistic personality disorder, was not generally accepted in the field of psychiatry at the time of trial, and counsel was ineffective for failing to bring this fact to the attention of the jury. In rejecting this claim, the PCRA court concluded that the diagnosis was, in fact, generally accepted and valid at the time of trial. The court noted that the diagnosis was listed in a handbook generally referred to by psychiatrists to classify mental disorders. At the time of trial, it was a proposed diagnostic category, which needed further study. However, it also was subsumed in a subset of diagnoses covered by "Personality Disorder Not Otherwise Specified." Trial court opinion, 10/21/96, at 8. The trial court concluded, "By inclusion in the catchall provision, which is not contained in an appendix to the [handbook], SPD [sadistic personality disorder] has been accepted as a classification, albeit one undergoing scrutiny." *Id.* at 8.

Furthermore, [the petitioner] attempted to establish that sadistic personality disorder was not a generally-accepted psychiatric diagnosis through the expert testimony of Dr. Susan Feister. With respect to Dr. Feister, the PCRA court observed:

> We take judicial notice of the fact that defendant's own psychiatric expert, Susan Feister, M.D., who criticized Dr. Jens's use of the SPD diagnosis, concluded as follows in a book chapter dated the same year as the trial:
>
> > Thus, data available to date, while not extensive, suggests that sadistic personality disorder, as described in the DSM III R describes a personality pattern with remarkably high internal consistency and descriptive validity.

> Gay, M. and Feister, S., Sadistic Personality Disorder, in *Psychiatry* (ed. R. Michels, J.B. Lippincott, 1990), 1 (21): 1-13.
>
> Trial court opinion, 10/21/96, at 8-9 (footnote omitted).
>
> The PCRA court concluded that this claim of ineffectiveness failed since sadistic personality disorder was generally accepted as a psychiatric diagnosis at the time of trial. Since this finding by the court is supported in the record, it will not be disturbed .... Hence, this contention affords [the petitioner] no relief.

Commonwealth v. Keller, No. 04137 Philadelphia 1996, slip op. at 9-10 (Pa. Super. June 19, 1997).

In his PCRA proceeding, the petitioner argued that Sadistic Personality Disorder ("SPD") was not a generally accepted diagnosis and, for this reason, trial counsel would have, had he prepared better, objected to the diagnosis of the Commonwealth expert that he suffered from SPD instead of a mental defect which would prevent him from understanding the nature and quality of his act when he killed his wife. The Superior Court found this claim had no merit because, as a matter of fact, SPD was a generally accepted diagnosis. The petitioner strenuously argues that the Superior Court's factual determination was erroneous. However, even if the Superior Court's factual determination was erroneous, such error would not necessarily permit this court to grant a writ of habeas corpus because this court is not free to examine the Superior Court's factual determination de novo. Instead, under the AEDPA, the question is whether the Superior Court's factual determination was an unreasonable determination of the facts in light of the evidence presented to the Superior Court.[5] 28 U.S.C. § 2254(d)(2).

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[5] The AEDPA also indicates that state court fact findings are presumed to be correct and that a petitioner must present clear and convincing evidence to rebut the presumption. 28 U.S.C. § 2254(e)(1). The Third Circuit has yet to explain how this provision of the AEDPA interacts with § 2254(d)(2). This opinion will only consider the application of § 2254(d)(2) and will not address what impact § 2254(e)(1) could have on the petitioner's claim.

The Third Circuit applied 28 U.S.C. § 2254(d)(2) in *Hartey v. Vaughn,* 186 F.3d 367 (3d Cir. 1999). While the Third Circuit's treatment of § 2254(d)(2) in *Hartey* was not nearly as extensive as its treatment of § 2254(d)(1) had been in *Matteo,* the court found that a state court's factual determination was not unreasonable within the meaning of § 2254(d)(2) when there was evidence in the record which was consistent with the factual determination made by the state court. *See Hartey,* 186 F-3d at 372-73. Thus, the court will examine whether there was evidence in the record considered by the Superior Court which was consistent with its factual determination.

The record reveals that there was evidence in the record that was consistent with the Superior Court's factual determination. Specifically, the expert the petitioner called at his PCRA hearing, Dr. Susan Feister, had opined in the same year as his trial that SPD was "a personality pattern with remarkably high internal consistency and descriptive validity." *Commonwealth v. Keller,* No. 04137 Philadelphia 1996, slip op. at 10 (Pa. Super. June 19, 1997). While Dr. Feister may no longer have held this view at the time she testified at the petitioner's PCRA hearing, the fact that she did at the time of the petitioner's trial is sufficient to show that the Superior Court's factual determination was reasonable within the meaning of 28 U.S.C. § 2254(d)(2).

The application of 28 U.S.C. § 2254(d)(1) remains. After *Matteo,* this court must focus on the state court's disposition of the legal basis for the petitioner's claim. *See Hartey,* 186 F.3d at 371 (quoting *Matteo,* 171 F.3d at 885). The Superior Court concluded that the petitioner's claim should fail because it lacked factual support. *Commonwealth v. Keller,* No. 04137 Philadelphia 1996, slip op. at 10 (Pa. Super. June 19, 1997). That is, the Superior Court found that counsel could not be ineffective for failing to raise a claim that was without merit.

The Supreme Court has never held that a lawyer could be ineffective for failing to pursue a claim which lacked merit. As such, the Superior Court's decision was not "contrary to" established Supreme Court precedent. *See Matteo,* 171 F.3d at 888.

Next, the court must consider whether the Superior Court's decision was an "unreasonable application of" Supreme Court precedent. In so doing, the court is permitted to consider the decisions of the federal courts inferior to the Supreme Court. *Matteo,* 171 F.3d at 890. The Third Circuit has held that an attorney should not be held ineffective for failing to raise a meritless claim. *Hartey,* 186 F.3d at 372; *Moore v. Deputy Commissioners of SCI-Huntingdon,* 946 F.2d 236, 245 (3d Cir. 1991). Since the Superior Court's decision is consistent with Third Circuit decisions which have applied Supreme Court precedent, the Superior Court's decision is not an "unreasonable application of" Supreme Court precedent. *See Matteo,* 171 F.3d at 890.

The petitioner's final claim is: "Trial counsel was ineffective for failing to object to the court's charge to the jury as it did not adequately explain the distinction between premeditation and deliberation, both elements of which are required for a conviction of first degree murder." Petitioner's First Brief at 47.

The Superior Court's disposition of this claim on PCRA appeal was as follows:

> [The petitioner's] next objection relates to counsel's failure to object to the jury charge on deliberation and premeditation. However, the instruction as given, as conceded by [the petitioner], was completely in accord with PSSCJI § 15.2502A. *See* R.R. at 600a-601a. No error occurred.

Commonwealth v. Keller, No. 04137 Philadelphia 1996, slip op. at 16 (Pa. Super. June 19, 1997).[6] In essence, the Superior Court's disposition of this claim was that counsel could not be ineffective for failing to raise a meritless claim. As explained with respect to the preceding ineffective assistance claim, such a disposition is neither "contrary to" nor an "unreasonable

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[6] "PSSCJI" refers to the Pennsylvania Suggested Standard Criminal Jury Instructions. As its name implies, it is a book which contains standard jury instructions for criminal cases which is used throughout Pennsylvania.

application of" Supreme Court precedent.[7] As such, the petitioner cannot prevail on his last claim.[8]

My recommendation follows.

[7] In this court, the petitioner also concedes that the instruction given at his trial was consistent with PSSCJI § 15.2502A. *See* Petitioner's Supplemental Reply at 4. In spite of this concession, he argues that the instruction given at his trial misstated Pennsylvania law. Petitioner's First Brief at 47-50; Petitioner's Supplemental Reply at 4-5. Inasmuch as "it is not the province of a federal habeas court to reexamine statecourt determinations on state-law questions," *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991), the court declines to reexamine the Superior Court's conclusion that PSSCJI § 15.2502A accurately states the requirements of Pennsylvania law.

[8] The petitioner does not argue that the Superior Court's disposition of his last claim could be challenged under 28 U.S.C. § 2254(d)(2). Accordingly, this question need not be addressed.

RECOMMENDATION

AND NOW, this 13th day of January, 2000, for the reasons contained in the preceding Report, it is hereby RECOMMENDED that the petition for a writ of habeas corpus be DENIED. It is also RECOMMENDED that a certificate of appealability not be granted.

/s/ DIANE M. WELSH

DIANE M. WELSH
UNITED STATES MAGISTRATE JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-1130

KERBY KEANE KELLER,
Appellant

v.

DAVID LARKINS, SUPERINTENDENT, SCI DALLAS;
THE DISTRICT ATTORNEY OF THE
COUNTY OF LANCASTER;
THE ATTORNEY GENERAL OF THE
STATE OF PENNSYLVANIA
[MIKE FISHER]

SUR PETITION FOR REHEARING

Present: BECKER, *Chief Judge,* SLOVITER, MANSMANN, SCIRICA, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, and FUENTES, *Circuit Judges*

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

/s/_____
Circuit Judge

DATED: 15 JUN 2001